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Statutes:

All laws specifically codified by the General Assembly of the State of Georgia through the 2015 Regular Session of the General Assembly.

Annotations of Judicial Decisions:

Case annotations reflecting decisions posted to LexisNexis® through April 3, 2015. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

Annotations of Attorney General Opinions:

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through April 3, 2015.

Other Annotations:

References to:

Emory Bankruptcy Developments Journal.
Emory International Law Review.
Emory Law Journal.
Georgia Journal of International and Comparative Law.
Georgia Law Review.
Georgia State University Law Review.
John Marshall Law Review.
Mercer Law Review.
Georgia State Bar Journal.
Georgia Journal of Intellectual Property Law.
American Jurisprudence, Second Edition.
American Jurisprudence, Pleading and Practice.
American Jurisprudence, Proof of Facts.
American Jurisprudence, Trials.
Corpus Juris Secundum.
Uniform Laws Annotated.
American Law Reports, First through Sixth Series.
American Law Reports, Federal.

Tables:

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2015 Regular Session of the General Assembly.

Indices:

A cumulative replacement index to laws codified in the 2015 supplement pamphlets and in the bound volumes of the Code.

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TITLE 9

CIVIL PRACTICE

VOLUME 6

Chap.

VOLUME 7

VOLUME 7A

Law reviews. — For article, "The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform," see 44 Ga. L. Rev. 433 (2010).

CHAPTER 2

ACTIONS GENERALLY

Article 1

General Provisions

Sec.

ARTICLE 1
GENERAL PROVISIONS

9-2-1. Definitions.

JUDICIAL DECISIONS

Cited in Buckler v. DeKalb County Bd. of Tax Assessors, 288 Ga. App. 332, 654 S.E.2d 184 (2007).

9-2-2. Actions in personam; actions in rem.

JUDICIAL DECISIONS

Cited in Spinner v. City of Dallas, 292 Ga. App. 251, 663 S.E.2d 815 (2008).

9-2-4. Pursuit of consistent or inconsistent remedies.

JUDICIAL DECISIONS

Full satisfaction bars further recovery.

Superior court did not err in reversing the decision of the Georgia Department of Revenue that a corporate officer was liable for a restaurant's sales and use taxes pursuant to O.C.G.A. § 48-2-52 because the release of and refund payment to the majority owner of the restaurant operated as a release of the officer; under O.C.G.A. § 13-1-13, by voluntarily paying the owner a settlement amount with full awareness of any potential joint claim it had against the officer, the Department forfeited any right the Department had to recoup from the officer the payment made to the owner. Ga. Dep't of Revenue v. Moore, 317 Ga. App. 31, 730 S.E.2d 671 (2012).

9-2-5. Prosecution of two simultaneous actions for same cause against same party prohibited; election; pendency of former action as defense; exception.

JUDICIAL DECISIONS

Analysis

General Consideration

Dismissal with prejudice. — While a trial court could dismiss a neighbor's third complaint pursuant to O.C.G.A. §§ 9-2-5(a) and 9-2-44(a), the court was not at liberty to do so with prejudice. McLeod v. Clements, 310 Ga. App. 235, 712 S.E.2d 627 (2011).

Cited in Adams v. Tricord, LLC, 299 Ga. App. 310, 682 S.E.2d 588 (2009).

Pendency of Former Action

O.C.G.A. § 9-2-5 prohibits plaintiff from prosecuting two actions, etc.

When a limited liability company brought a tort action against a county

industrial development authority after filing an exception to a special master's award in a condemnation proceeding, the trial court properly dismissed the tort action under O.C.G.A. §§ 9-2-5(a) and 9-12-40. In both the condemnation action and the tort action, the company sought a monetary award on the ground that the condemnation rendered its contract a nullity and that the condemnation action was brought in bad faith. Coastal Water & Sewerage Co. v. Effingham County Indus. Dev. Auth., 288 Ga. App. 422, 654 S.E.2d 236 (2007).

First suit absolute defense to second suit.

Plaintiffs' suit against three corporations was barred by O.C.G.A. §§ 9-2-5(a) and 9-2-44(a) as a prior suit involving the same parties and claims had been dismissed and an appeal of the dismissal was pending. That there were minor differences between the two complaints and that plaintiffs added new defendants was immaterial. Sadi Holdings, LLC v. Lib Props., Ltd, 293 Ga. App. 23, 666 S.E.2d 446 (2008).

"Renewal suit" filed by a limited liability company (LLC) and the company's manager against three corporations was properly dismissed under O.C.G.A. §§ 9-2-5(a) and 9-2-44(a) as the LLC and manager's prior and nearly identical suit against the corporation had been dismissed and an appeal was pending. However, the second dismissal should have been without prejudice under O.C.G.A. § 9-11-41(b) as the corporation's plea in abatement did not challenge the merits of that suit. Sadi Holdings, LLC v. Lib Props., Ltd, 293 Ga. App. 23, 666 S.E.2d 446 (2008).

Dismissal of action.

Trial court did not err in dismissing an officer's claims against entities pursuant to the "prior action pending doctrine," O.C.G.A. § 9-2-5(a), because the officer previously filed a similar action in the same court that was transferred to another county; the claims in the two actions were similar and the same facts were pled in both actions. Odion v. Varon, 312 Ga. App. 242, 718 S.E.2d 23 (2011), cert. denied, No. S12C0399, 2012 Ga. LEXIS 561 (Ga. 2012).

No action "pending" without service.

Because the Department of Transportation failed to show that service of process had been effectuated in an alleged prior pending personal injury suit filed in Brantley County, based on the same accident a driver sued upon in Wayne County, the Brantley County suit was not "pending," as that term was defined in O.C.G.A. § 9-2-5(a). Thus, the trial court erred in dismissing the driver's Wayne County suit. Watson v. Ga. DOT, 288 Ga. App. 40, 653 S.E.2d 763 (2007).

Same defendant and same cause of action.

Shareholder's action to inspect corporate records brought in Cobb County was not barred by a prior action brought by the shareholder in Fulton County because the parties were not identical and the causes of action were not the same. The Cobb County suit sought only access to corporate records and attorney fees, while the Fulton County suit sought damages for breach of fiduciary duties, punitive damages, attorney fees, and the forced repurchase of the shareholder's shares. Advanced Automation, Inc. v. Fitzgerald, 312 Ga. App. 406, 718 S.E.2d 607 (2011).

Prior pending wrongful foreclosure suit did not require dismissal of condemnation proceeding. — Prior pending wrongful foreclosure action did not require the abatement and dismissal of a bank's application for confirmation under O.C.G.A. § 44-14-161 because the confirmation proceeding did not involve the same cause of action as the wrongful foreclosure suit, but was instead a special statutory proceeding and not a complaint which initiated a civil action or suit. BBC Land & Dev., Inc. v. Bank of N. Ga., 294 Ga. App. 759, 670 S.E.2d 210 (2008).

Dismissal of counterclaim in second action erroneously denied. — In a personal injury accident between two drivers, the trial court erroneously denied the first driver's motion to dismiss a counterclaim asserted by the second driver because the second driver had a prior pending action against the first driver in another county, and the parties' status in both actions was identical. Moreover, given the first driver's assurances that the

Pendency of Former Action (Cont'd)

instant suit would be dismissed in favor of defending the second driver's claims in the prior pending action, the denial of the first driver's motion to dismiss the second driver's counterclaim was inconsistent with the purpose of O.C.G.A. § 9-2-5. Jenkins v. Crea, 289 Ga. App. 174, 656 S.E.2d 849 (2008).

Action barred.

Bank sued the bank's customer to recover for an overdraft; before filing the customer's counterclaim, the customer sued the bank in another county. As the customer raised the same claims in the customer's complaint and counterclaim, and as there was a logical relationship between the parties' claims, the customer's counterclaim was compulsory; therefore, the customer's suit against the bank was barred by O.C.G.A. § 9-2-5(a). Steve A. Martin Agency, Inc. v. PlantersFIRST Corp., 297 Ga. App. 780, 678 S.E.2d 186 (2009).

As a bank filed suit against the bank's customer before the latter filed suit against the former, and both suits involved the same cause of action, the customer's suit was properly dismissed under O.C.G.A. § 9-2-5(a). Though the bank did not serve the customer until the customer's suit was filed, the service on the customer related back to the date of filing, which established the date the bank's suit was commenced. Steve A. Martin Agency, Inc. v. PlantersFIRST Corp., 297 Ga. App. 780, 678 S.E.2d 186 (2009).

9-2-7. Implied promise to pay for services or property.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Recovery under a quantum meruit theory. — Peanut company was entitled to payment from a cooperative bank under a quantum meruit theory because the bank directed the company to receive, process, and shell peanuts, and the company's efforts were valuable to the bank. Farm Credit of Northwest Fla., ACA v. Easom Peanut Co., 312 Ga. App. 374, 718 S.E.2d 590 (2011), cert. denied, 2012 Ga. LEXIS 315 (Ga. 2012).

Cited in Ekokotu v. Fed. Express Corp., No. 10-12433, 2011 U.S. App. LEXIS 1126 (11th Cir. Jan. 19, 2011).

Implied Promises, Generally

Express agreement denounced by law cannot be made legal and binding as implied contract, etc.

No recovery was permitted for a subcontractor in quantum meruit under O.C.G.A. § 9-2-7 as the express subcontract violated public policy and a subcontractor's lien under O.C.G.A. §§ 44-14-361.1 and 44-14-367 could not be filed. Although a subcontractor claimed to have been regularly connected to a Georgia-licensed electrician in order to comply with O.C.G.A. § 43-14-8(f), evidence indicated that the Georgia-licensed electrician simply applied for necessary project permits and did not inspect the electrical work performed or that the work complied with the applicable codes. If an express contract is found to be void as a violation of public policy, an implied contract will not be found to have existed for the same reason. JR Construction/Electric, LLC v. Ordner Constr. Co., 294 Ga. App. 453, 669 S.E.2d 224 (2008).

Performance of services in addition to those contracted for.

Trial court did not err by charging the jury on quantum meruit because the allegations in the contractor's complaint were sufficient to raise a claim of quantum meruit where the contractor alleged that the contractor entered into a contract to

supervise the construction of improvements to the homeowners' residence but that the homeowners ordered several additional improvements and further extensive renovations to be made to the residence; that the homeowners were fully aware of any and all changes to the estimates previously provided and that the homeowners approved the changes and agreed to any and all ensuing changes to the originally agreed-upon price; and that the contractor remained uncompensated for the reasonable value of the contractor's work. One Bluff Drive, LLC v. K. A. P., Inc., 330 Ga. App. 45, 766 S.E.2d 508 (2014).

Broker's commission.

Award of quantum meruit recovery in favor of a broker in the broker's suit against a buyer was affirmed on appeal after: (1) the broker performed as an agent and rendered valuable services to the buyer in the form of locating certain goods and components and providing contacts; (2) the services were performed at the request of the buyer; (3) it would have been unjust for the buyer to accept the services without compensating the broker; (4) the broker had an expectation of compensation at the time the broker rendered the services; and (5) no contract of employment existed as the broker and the buyer did not have a meeting of the minds as to the essential terms of employment. Litsky v. G.I. Apparel, Inc., No. 05-12351, 2005 U.S. App. LEXIS 22150 (11th Cir. Oct. 12, 2005) (Unpublished).

Implied Promises Between Relatives

Services rendered to spouse. — There was no evidence to support an award of damages in quantum meruit against a husband in a wife's action alleging that the husband's father breached an oral agreement to deed a parcel of property to the wife and the husband because there was no present benefit to the husband since the husband did not own the property or any interest in the property; there was no evidence that there was ever any expectation by either party that the wife would be compensated by the husband for the wife's contributions to their businesses while they were a married couple. Wallin v. Wallin, 316 Ga. App. 455, 729 S.E.2d 567 (2012).

Application

Plaintiff debtor-in-possession properly stated a claim for unjust enrichment because the plaintiff alleged that a debtor transferred a benefit to defendant (or that defendant took a benefit from the debtor) without a contract, compensation, or consideration, and that defendant, under equitable principles, ought to return that benefit to the debtor. MC Asset Recovery, LLC v. Southern Co., No. 1:06-CV-0417-BBM, 2006 U.S. Dist. LEXIS 97034 (N.D. Ga. Dec. 11, 2006).

Failed investments in sporting event parties. — Professional basketball player was not liable to inexperienced businessmen who invested and lost money by hosting sports event-related parties based on an oral agreement with two men claiming to act as the player's agents. The businessmen's claim for unjust enrichment under O.C.G.A. § 9-2-7 was unsuccessful because there was no evidence that money was transferred into the player's accounts, and a failed investment was not a cognizable basis for relief in quantum meruit. J'Carpc, LLC v. Wilkins, 545 F. Supp. 2d 1330 (N.D. Ga. 2008).

Insufficient evidence of representation to pay more for medical services. — Insurance company and the corporation were entitled to summary judgment on the burn center's quantum meruit claim because the burn center failed to substantiate how or why the medical services the center provided to the corporation's employee were beneficial or valuable to the corporation or the insurance company and the center never specifically identified what it was alleging the insurance company and the corporation received when the center provided medical services to the corporation's employee. Further, there was nothing in the language of Mississippi's Workers' Compensation Medical Fee Schedule, Miss. Code Ann. § 71-3-15, to indicate that the rate of reimbursement for out-of-state services was contingent upon whether a foreign state's medical fee schedule would apply in that foreign state, and so, to the extent the insurance company benefited from the discharge of a statutory obligation under

Application (Cont'd)

Mississippi law, the undisputed evidence showed that it already paid the reasonable value for the burn center's services; therefore, there was no evidence in the record demonstrating that the insurance company or the corporation ever made any representation that they would be willing to pay anything more than what was required of them by Georgia or Mississippi workers' compensation law. Joseph M. Still Burn Ctrs., Inc. v. AmFed Nat'l Ins. Co., No. 109-34, 2010 U.S. Dist. LEXIS 31299 (S.D. Ga. Mar. 31, 2010).

Claim against state agency barred by sovereign immunity. — Computer contractor that had an unsigned copy of an agreement and an invoice for services rendered failed to show that the contractor had a signed agreement with a state agency for purposes of the state's waiver of immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(c). The contractor's claims for unjust enrichment were also barred by sovereign immunity. Ga. Dep't of Cmty. Health v. Data Inquiry, LLC, 313 Ga. App. 683, 722 S.E.2d 403 (2012).

Ultra vires contract not enforceable under quantum meruit theory of recovery against city. — Appellate court erred by holding that an environmental engineering company could recover against a city on the company's quantum meruit claim because quantum meruit was not an available remedy against the city since the claim was based on a municipal contract that was ultra vires as the contract was never approved by city council. City of Baldwin v. Woodard & Curran, Inc., 293 Ga. 19, 743 S.E.2d 381 (2013).

Clear that services were requested or knowingly accepted. — Trial court erred by granting summary judgment to the defendants on the part owner's claim for quantum meruit and unjust enrichment because it was clear that the part owner provided services that benefitted the defendants and were either requested or knowingly accepted. Bedsole v. Action Outdoor Adver. JV, LLC, 325 Ga. App. 194, 750 S.E.2d 445 (2013).

9-2-8. Private rights of action not created unless expressly stated.

(a) No private right of action shall arise from any Act enacted after July 1, 2010, unless such right is expressly provided therein.

(b) Nothing in subsection (a) of this Code section shall be construed to prevent the breach of any duty imposed by law from being used as the basis for a cause of action under any theory of recovery otherwise recognized by law, including, but not limited to, theories of recovery under the law of torts or contract or for breach of legal or private duties as set forth in Code Sections 51-1-6 and 51-1-8 or in Title 13. (Code 1981, § 9-2-8, enacted by Ga. L. 2010, p. 745, § 2/SB 138.)

Effective date. — This Code section became effective July 1, 2010.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2010, "after July 1, 2010," was substituted for "after the effective date of this Code section" in subsection (a).

Editor's notes. — Ga. L. 2010, p. 745, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Transparency in Lawsuits Protection Act.'"

Law reviews. — For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010).

ARTICLE 2

PARTIES

9-2-20. Parties to actions on contracts; action by beneficiary.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Cited in Brenner v. Future Graphics, LLC, 258 F.R.D. 561 (N.D. Ga. 2007).

Parties to Actions, Generally

Non-party could not challenge validity of agreement, but could seek a declaration of rights. — In a dispute between a back-up buyer and the buyer and sellers of real property, the back-up buyer had standing under O.C.G.A. § 9-4-2 to seek a declaration of its rights, if any, to the disputed property, although it was not a party to the contracts between the buyer and the sellers; however, the back-up buyer did not have standing to challenge the signatures on those contracts pursuant to O.C.G.A. § 9-2-20. Del Lago Ventures, Inc. v. QuikTrip Corp., 330 Ga. App. 138, 764 S.E.2d 595 (2014).

Mortgagor lacked standing to assert the breach-of-contract claim because the mortgagor lacked standing to contest the validity of the transfer or assignment of the loan documents based on the pooling and servicing agreement (PSA) because the mortgagor conceded that the mortgagor was not a party to the PSA. Cornelius v. Bank of Am., NA, No. 13-14905, 2014 U.S. App. LEXIS 18396 (11th Cir. Sept. 25, 2014) (Unpublished).

Assignee as real party in interest. Trial court erred in granting an assignee summary judgment in an action against a debtor to collect the amount owed on a credit card account agreement the debtor allegedly entered into with an assignor because the assignee failed to show that it was entitled to file suit to recover the outstanding debt against the debtor pursuant to O.C.G.A. § 9-11-17(a); the assignee relied on the affidavit of its agent and business records custodian of its credit card accounts to show that the assignor transferred to it all rights and interests to the debtor's account, but the affidavit failed to refer to or attach any written agreements that could complete the chain of assignment from the assignor to the assignee, and although the assignee contended that the debtor did not raise its failure to present a valid assignment in the trial court, the record reflected that that issue was squarely before the trial court because the assignee directly addressed the debtor's defense under § 9-11-17 in its motion for summary judgment, referring to the affidavit to show that it was the assignee. Wirth v. Cach, LLC, 300 Ga. App. 488, 685 S.E.2d 433 (2009).

Former husband lacked standing to assert claims arising from violations of security deed. — Because a former husband was never a party to a security deed and had no legal interest in the property at the time a bank and a law firm sent notices of the default and the acceleration, the former husband lacked standing to assert any claims arising from violations of the security deed; therefore, it was of no consequence even if the bank and law firm had failed to comply with the notice provisions in the security deed. Farris v. First Fin. Bank, 313 Ga. App. 460, 722 S.E.2d 89 (2011).

Corporation lacked standing to pursue damages. — Trial court did not err in directing a verdict against a corpo-

Parties to Actions, Generally (Cont'd)

ration and the corporation's owner as to their breach of contract and wrongful foreclosure claims because two of the owner's other companies suffered damages from the alleged misconduct, and those entities were not parties to the suit; the corporation lacked standing to pursue any damages belonging to the companies, and thus, the trial court properly determined that the corporation and owner were not entitled to recover damages belonging to the companies. The trial court properly determined that the corporation and the owner were not entitled to recover damages belonging to the companies. Canton Plaza, Inc. v. Regions Bank, Inc., 315 Ga. App. 303, 732 S.E.2d 449 (2012).

Action by removed member of LLC. — Party to an LLC operating agreement had standing to bring an action for the breach of contract even though the party had been removed as a member of the LLC under O.C.G.A. § 9-2-20(a). Kaufman Development Partners, L.P. v. Eichenblatt, 324 Ga. App. 71, 749 S.E.2d 374 (2013).

Homeowners' actions against loan servicers. — While the mortgagors alleged a transfer of the mortgagors' security deed violated a pooling and servicing agreement (PSA), and that the attorney transferring the security deed lacked authority, the mortgagors were not a party to the PSA or the challenged transfer, and thus did not have standing to contest the validity of the transfer under O.C.G.A. § 9-2-20(a). Edward v. BAC Home Loans Servicing, L.P., No. 12-15487, 2013 U.S. App. LEXIS 17054 (11th Cir. Aug. 16, 2013) (Unpublished).

Only insured or assignee can maintain action on policy.

Trustee in a holding company's bankruptcy case did not have the right to bring a breach of contract claim against an insurer under a fidelity bond; although both the holding company and the company's subsidiary, a bank, were named as insureds, only the bank had the right to bring the claim under the terms of the bond because the bank's employees caused the alleged loss. Lubin v. Cincinnati Ins. Co., 677 F.3d 1039 (11th Cir. 2012) (Unpublished).

Action against a corporation under joint venture theory. — In an insured's suit asserting claims for breach of contract under O.C.G.A. § 9-2-20 in connection with an insurer's denial of the insured's claim for proceeds of a long-term disability insurance policy, the parent corporation of the insurer, which administered the insurer's policies, was not liable under a joint venture theory because the insured's claims sounded in contract, not negligence. Adams v. UNUM Life Ins. Co. of Am., 508 F. Supp. 2d 1302 (N.D. Ga. 2007).

Action against a corporation under an alter ego theory.

In an insured's suit asserting claims for breach of contract under O.C.G.A. § 9-2-20 in connection with an insurer's denial of the insured's claim for proceeds of a long-term disability insurance policy, the parent corporation of the insurer was not liable under an alter ego theory; because the insurer was not insolvent and had funds sufficient to satisfy any judgment for the insured, the insurer's corporate veil could not be pierced so as to hold the parent liable, even if the insurer and the parent failed to maintain separate corporate existences. Adams v. UNUM Life Ins. Co. of Am., 508 F. Supp. 2d 1302 (N.D. Ga. 2007).

Plaintiffs could not assert claim based on instruments to which plaintiffs were not parties or third-party beneficiaries. — Plaintiffs' claim that the defendant violated the "one satisfaction rule" by foreclosing on their home failed because the plaintiffs could not assert a claim against the defendant based on a purported insurance policy or settlement agreement as the plaintiffs were not parties to, or third-party beneficiaries of, those instruments. Fenello v. Bank of Am., N.A., 2013 U.S. Dist. LEXIS 159925 (N.D. Ga. Nov. 8, 2013).

Siblings who signed separate notes for mutual businesses. — Sibling who was not a party to or a third-party beneficiary of the other's residential mortgage, equity line of credit, or promissory note lacked standing to raise claims based on those transactions, although both the borrower and the sibling took out personal

loans associated with their furniture businesses. Nelson v. Hamilton State Bank, 331 Ga. App. 419, 771 S.E.2d 113 (2015).

In a case in which a pro se borrower argued that an assignment was invalid because it was executed after the creditor assigned the note and did not comply with the pooling and servicing agreement for the trust or state law, the borrower lacked standing since the borrower was not a party to the assignment. Morrison v. Bank of Am., N.A., No. 1:13-cv-1052-WSD, 2014 U.S. Dist. LEXIS 104426 (N.D. Ga. July 31, 2014).

Trust that did not exist at time of transaction not a party. — Trial court did not err in granting summary judgment to the sellers as to the claims made by a trust against them because, when the sale and purchase of the house at issue was conducted, the trust did not even exist at the time the alleged misrepresentations or fraudulent concealments were made, thus, there was no evidence existing that the trust relied on the alleged misstatements. Stephen A. Wheat Trust v. Sparks, 325 Ga. App. 673, 754 S.E.2d 640 (2014).

Third Party Beneficiaries

Underlying contract required before one can be third-party beneficiary. — Contractor was not a third-party beneficiary of the relationship between a county and the Environmental Protection Department because a Land Application System permit issued to the county was not a contract. Forsyth County v. Waterscape Servs., LLC, 303 Ga. App. 623, 694 S.E.2d 102 (2010).

Action by third person with incidental benefit barred.

Under O.C.G.A. § 9-2-20(b), a successor to a competing sponsor was not a third party beneficiary of an agreement between a race car owner and a promoter, but was merely an incidental beneficiary; thus, the successor lacked standing to challenge the promoter's interpretation of the agreement, and a preliminary injunction against the promoter was improper. AT&T Mobility, LLC v. NASCAR, Inc., 494 F.3d 1356 (11th Cir. 2007).

Insured not intended third-party beneficiary. — In an insured's suit asserting claims for breach of contract under O.C.G.A. § 9-2-20 in connection with an insurer's denial of the insured's claim for proceeds of a long-term disability insurance policy, the insured's claim against the parent corporation of the insurer failed because the insured was not an intended third-party beneficiary of a contract whereby the parent provided administrative services for the insurer's policies. That the insured benefitted from the performance of that contract was inconsequential, as the contract required the parent to provide a wide variety of other services to the insurer, including auditing, cash management, and marketing services. Adams v. UNUM Life Ins. Co. of Am., 508 F. Supp. 2d 1302 (N.D. Ga. 2007).

Third party status determined by construction of contract.

In a breach of contract action, the appellate court erred in concluding that a worker killed at a city airport construction site was an intended beneficiary of all of the contracts between the city and the contractors as the court did not properly consider the definition of the term "all participants" and did not consider the parties' contractual obligations separately. Archer W. Contrs., Ltd. v. Estate of Estate of Pitts, 292 Ga. 219, 735 S.E.2d 772 (2012).

In a premises liability action, the trial court properly granted summary judgment to the hotel franchisee where there was no genuine issue of material fact that no apparent agency existed between the hotel owner and the franchisee and the franchise contract between the hotel and the franchisee showed no intent to benefit third persons such as hotel guests. Bright v. Sandstone Hospitality, LLC, 327 Ga. App. 157, 755 S.E.2d 899 (2014).

Intended third party beneficiary of a contract.

Insurer was not a third-party beneficiary entitled to enforce an arbitration clause of a loan agreement because the loan agreement did not show any intent to allow anyone other than the buyer, seller, and assignee of the seller and the lender to compel arbitration of disputes under the loan agreement. Lawson v. Life of the South Ins. Co., 648 F.3d 1166 (11th Cir. 2011).

Third Party Beneficiaries (Cont'd)

Trial court did not err in concluding that a landowner had standing to assert a breach of contract claim because on its face a site plan's location of a dock was intended to benefit the landowner's by protecting the landowner's ability to place a dock between one dock and another dock. Dillon v. Reid, 312 Ga. App. 34, 717 S.E.2d 542 (2011).

Contracts between public entity and others were for benefit of public. — City's water customers were not third party beneficiaries of the contracts between the city and the city's contractors who provided meter services under O.C.G.A. § 9-2-20(b) because those contracts were intended to benefit the public generally, not the customers specifically. City of Atlanta v. Benator, 310 Ga. App. 597, 714 S.E.2d 109 (2011).

Debtors as beneficiaries under Home Affordable Modification Program. — Debtors lacked standing to sue a bank as third party beneficiaries since the debtors were merely incidental beneficiaries of, and did not have enforceable rights under the Home Affordable Modification Program and a service participation agreement. Salvador v. Bank of Am., N.A. (In re Salvador), 456 B.R. 610 (Bankr. M.D. Ga. 2011).

Denial of bank's motion to dismiss was reversed because homeowners were mere incidental beneficiaries who lacked standing to enforce the Home Affordable Modification Program (HAMP) Agreements. As such, the borrower did not have a private right of action to enforce HAMP against the bank. U. S. Bank, N.A. v. Phillips, 318 Ga. App. 819, 734 S.E.2d 799 (2012).

No third-party beneficiaries to agreement. — Trial court did not err by finding that an inmate was not a third-party beneficiary to the contract between the county sheriff's office and a medical provider because under the express terms of the contract, there were no third-party beneficiaries to the agreement. Graham v. Cobb County, 316 Ga. App. 738, 730 S.E.2d 439 (2012).

Bank did not have standing as third party beneficiary of agreement between borrower and borrower's debtor. — Under O.C.G.A. § 9-2-20(b), a bank was not a third party beneficiary of a guaranty agreement between the bank's borrower and a supplier, although the supplier agreed to deposit all funds owed to the borrower into the borrower's account at the bank. The agreement and letter between the borrower and the supplier did not show any intention that the bank be benefited. U.S. Foodservice, Inc. v. Bartow County Bank, 300 Ga. App. 519, 685 S.E.2d 777 (2009).

Car owner not third party beneficiary in contract between mechanic and garage. — Car owner was not a third party beneficiary under O.C.G.A. § 9-2-20(b) of a repair contract between the owner's mechanic and a garage to which the mechanic took the car for additional advice and repairs regarding an overheating problem. Dominic v. Eurocar Classics, 310 Ga. App. 825, 714 S.E.2d 388 (2011).

Failure to show third party beneficiary status. — Trial court did not err in granting a clinic's motion under O.C.G.A. § 9-11-12(b)(6) to dismiss for failure to state a claim as the patients' action failed to state a claim that the patients were entitled as third-party beneficiaries to sue for breach of the contract between the clinic and another medical provider to provide free dialysis treatment for one year after the clinic closed; the contract did not clearly show on the contract's face that the contract was intended for the benefit of the patients as required under O.C.G.A. § 9-2-20(b), and the contract plainly showed that there was no intent to confer third-party beneficiary status on existing clinic outpatients. Andrade v. Grady Mem'l Hosp. Corp., 308 Ga. App. 171, 707 S.E.2d 118 (2011).

Complaint Allegations Sufficient

Allegations in complaint sufficiently set out third party beneficiary right. — Trial court erred in granting the defendant's motion to dismiss the plaintiff's claim for breach of contract because the allegations that the defendant demanded and received from the plaintiff an additional $3,850 for license and trophy fees in connection with the purchase of the safari arguably showed the flow of consideration directly from the plaintiff to the

defendant for goods and services that the defendant allegedly failed to provide thus creating a third party beneficiary right for the plaintiff. Wright v. Waterberg Big Game Hunting Lodge Otjahewita (Pty), Ltd., 330 Ga. App. 508, 767 S.E.2d 513 (2014).

9-2-21. Parties to actions for torts; notice to Department of Community Health for a party who has received medical assistance benefits.

JUDICIAL DECISIONS

Party without involvement in business not proper party. — In a personal injury case in which a hotel moved for summary judgment, it was not a proper party under O.C.G.A. § 9-2-21(b). The hotel demonstrated that the hotel did not own, manage, or otherwise have any participation or involvement with the hotel in question. Vidal v. Otis Elevator Co., No. 1:11-CV-03518-RWS, 2012 U.S. Dist. LEXIS 56180 (N.D. Ga. Apr. 20, 2012).

ARTICLE 3

ABATEMENT

9-2-40. No abatement on death of party where cause survives.

JUDICIAL DECISIONS

Administrator proper party to pursue civil rights claims. — In a declaratory judgment case and pursuant to O.C.G.A. §§ 9-2-40 and 9-2-41, an administrator had standing and was the proper party to pursue any surviving 42 U.S.C. §§ 1981 and 1988 civil rights claims on behalf of the decedent's estate. Am. Gen. Life & Accident Ins. Co. v. Ward, 509 F. Supp. 2d 1324 (N.D. Ga. Mar. 12, 2007).

9-2-41. Nonabatement of tort actions; survival of cause; no punitive damages against representative.

Law reviews. — For survey article on wills, trusts, guardianships, and fiduciary administration, see 59 Mercer L. Rev. 447 (2007).

JUDICIAL DECISIONS

Standing of representatives. — Before determining whether the estates, representatives of the decedents, or direct heirs stated a valid cause of action under 28 U.S.C. § 1605A, the court had to first determine whether the estates had standing to pursue claims for emotional and mental anguish that the decedents suffered while still alive. The court permitted the claims of four of the servicemen's estates to proceed because: (1) pursuant to O.C.G.A. § 9-2-41, Georgia courts frequently entertained suits, without limitation, brought by estate representatives for personal injury suffered by the decedent while still alive; (2) N.Y. Est. Powers & Trusts Law § 11-3.2 ensured that all tort and contract actions that belonged to a decedent may now be maintained by the estate's personal representative; (3) Puerto Rico's law regarding causes of action by members of an estate permitted individual members to bring a cause of action for the decedent's pain and suffer-

ing; and (4) the survivability statute, S.C. Code Ann. § 15-5-90 had a wide ambit, and generally any cause of action which could have been brought by the deceased in the deceased's lifetime survived to the deceased's representative. Anderson v. Islamic Republic of Iran, No. (RCL), 2010 U.S. Dist. LEXIS 126457 (DC Dec. 1, 2010).

Action not viable prior to death. — Beneficiaries' claims against a former trustee failed because the cause of action was not viable against the former trustee before the former trustee's death. Nalley v. Langdale, 319 Ga. App. 354, 734 S.E.2d 908 (2012).

Administrator proper party to pursue civil rights claims. — In a declaratory judgment case and pursuant to O.C.G.A. §§ 9-2-40 and 9-2-41, an administrator had standing and was the proper party to pursue any surviving 42 U.S.C. §§ 1981 and 1988 civil rights claims on behalf of the decedent's estate. Am. Gen. Life & Accident Ins. Co. v. Ward, 509 F. Supp. 2d 1324 (N.D. Ga. Mar. 12, 2007).

Administrator in a RICO action could maintain suit. — In a case in which the intended beneficiaries of two life insurance policies alleged violations of Georgia's Racketeer Influenced & Corrupt Organizations Act (RICO), O.C.G.A. § 16-4-1 et seq., the representative of the decedent's estate may be able to recover in a representative capacity for acts directed toward, or harm incurred by, the decedent. Under O.C.G.A. § 9-2-41, a tort action did not abate by the death of the injured party, but survived to the personal representative of the decedent. Am. Gen. Life & Accident Ins. Co. v. Ward, 509 F. Supp. 2d 1324 (N.D. Ga. Mar. 12, 2007).

9-2-44. Effect of former recovery; pendency of former action.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Status of second action.

"Renewal suit" filed by a limited liability company (LLC) and the company's manager against three corporations was properly dismissed under O.C.G.A. §§ 9-2-5(a) and 9-2-44(a) as the LLC and manager's prior and nearly identical suit against the corporation had been dismissed and an appeal was pending. However, the second dismissal should have been without prejudice under O.C.G.A. § 9-11-41(b) as the corporation's plea in abatement did not challenge the merits of that suit. Sadi Holdings, LLC v. Lib Props., Ltd, 293 Ga. App. 23, 666 S.E.2d 446 (2008).

Third action dismissal. — While a trial court could dismiss a neighbor's third complaint pursuant to O.C.G.A. §§ 9-2-5(a) and 9-2-44(a), the court was not at liberty to do so with prejudice. McLeod v. Clements, 310 Ga. App. 235, 712 S.E.2d 627 (2011).

Cited in DOCO Credit Union v. Chambers, 330 Ga. App. 633, 768 S.E.2d 808 (2015).

Former Recovery

New parties. — Plaintiffs' suit against three corporations was barred by O.C.G.A. §§ 9-2-5(a) and 9-2-44(a) as a prior suit involving the same parties and claims had been dismissed and an appeal of the dismissal was pending. That there were minor differences between the two complaints and that plaintiffs added new defendants was immaterial. Sadi Holdings, LLC v. Lib Props., Ltd, 293 Ga. App. 23, 666 S.E.2d 446 (2008).

Pendency of Actions

Prior pending wrongful foreclosure suit did not require dismissal of condemnation suit. — Prior pending wrong-

ful foreclosure action did not require the abatement and dismissal of a bank's application for confirmation under O.C.G.A. § 44-14-161 because the confirmation proceeding did not involve the same cause of action as the wrongful foreclosure suit, but was instead a special statutory proceeding and not a complaint which initiated a civil action or suit. BBC Land & Dev., Inc. v. Bank of N. Ga., 294 Ga. App. 759, 670 S.E.2d 210 (2008).

ARTICLE 4

DISMISSAL AND RENEWAL

9-2-60. Dismissal for want of prosecution; costs; recommencement within six months.

Law reviews. — For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008).

JUDICIAL DECISIONS

Analysis

General Consideration

Case properly dismissed.

Trial court properly dismissed a party's counterclaim for failure to prosecute under O.C.G.A. §§ 9-2-60(b) and 9-11-41(e). It was undisputed that there had been no written order entered in the case for a period of over five years; even if there was evidence supporting the party's claim that the party had attempted to have the case placed on the trial calendar, the case the party relied upon had been reversed; and it had been held that the automatic dismissal statutes did not violate due process. Roberts v. Eayrs, 297 Ga. App. 821, 678 S.E.2d 535 (2009).

Because no written order was entered in the parents' wrongful death action for five years, pursuant to O.C.G.A. § 9-2-60(b), the action was dismissed by operation of law; therefore, the trial court's memorialization of the automatic dismissal resulting from that fact was not erroneous. Cornelius v. Morris Brown College, 299 Ga. App. 83, 681 S.E.2d 730 (2009).

Trial court did not err in dismissing a condemnation case for lack of prosecution pursuant to O.C.G.A. § 9-2-60(b) because the last qualifying order entered in the case was the certificate of immediate review signed by the trial court and entered on the trial court's records on April 7, 2004, which was two months before the owner filed the owner's motion under Ga. Unif. Super. Ct. R. 7.1 to have the matter placed on the trial court's next available pretrial calendar to address the notice of appeal challenging the amount of compensation. If the owner wished to further litigate the owner's claims, the owner had ample time to obtain a trial court order that would have allowed that, but the owner failed to do so. Windsor v. City of Atlanta, 287 Ga. 334, 695 S.E.2d 576 (2010).

Dismissal erroneously granted. — Trial court erroneously dismissed a litigant's petition for a writ of mandamus, and erroneously relied on dicta, in finding that orders setting a pre-trial conference in the underlying medical malpractice action were merely "housekeeping or administrative orders" that did not suspend the running of the five-year period under

General Consideration (Cont'd)

O.C.G.A. §§ 9-2-60(b) and 9-11-41(e). Instead, such orders tolled the running of the five-year rule if it was in writing, signed by the trial judge, and properly entered in the records of the trial court. Zepp v. Brannen, 283 Ga. 395, 658 S.E.2d 567 (2008).

Trial court erred by dismissing a father's contempt action because the final consent order had not been entered within the five-year rule under O.C.G.A. § 9-2-60(b) because the legitimation, custody, and support matter had been resolved by consent and all that remained was entry of the order; thus, the case presented an exception to the five-year rule. Ga. Dep't of Human Servs. v. Patton, 322 Ga. App. 333, 744 S.E.2d 854 (2013).

Civil renewal provisions apply in habeas corpus proceedings. — O.C.G.A. § 9-14-42(c) was not a statute of repose and not an absolute bar to the refiling of a habeas corpus petition, and therefore, was not in conflict with the provisions of O.C.G.A. §§ 9-2-60(b) and (c) and 9-11-41(e), which allowed for the renewal of civil actions after dismissal. Therefore, the habeas court's dismissal of a petition as untimely was reversed. Phagan v. State, 287 Ga. 856, 700 S.E.2d 589 (2010).

Timing

Computation of five-year period.

Trial court correctly determined that a products liability case had been dismissed by operation of law pursuant to O.C.G.A. § 9-2-60(b) because an order granting the plaintiffs' attorney a leave of absence was improvidently entered in violation of the automatic stay in bankruptcy and was void, and the record affirmatively showed that the case was inactive for a period of five years when the bankruptcy stay was not in place. Jinks v. Eastman Enters., 317 Ga. App. 489, 731 S.E.2d 378 (2012).

Dismissal is automatic on expiration of five-year period, etc.

Five ad valorem tax appeals were properly dismissed because more than five years had passed since entry of the last order in each of the cases, and the clear language of this provision stated that automatic dismissal applied to "any action or other proceeding," which included appeals from property assessment valuations. Pace Burt, Inc. v. Dougherty County Bd. of Tax Assessors, 305 Ga. App. 111, 699 S.E.2d 34 (2010).

Writing Requirement

Order must be properly entered in records of court to toll five-year period. — As a jury selection notice sent by the trial court to the parties was not stamped by the clerk of court's office as "filed," and there was nothing else in the record to show that the notice was properly entered in the records of the court, the jury selection notice did not meet the requirements for a written order that tolled the five-year dismissal period of O.C.G.A. § 9-2-60(b). Therefore, the trial court erred in denying the defendants' motion to dismiss. Pilz v. Thibodeau, 293 Ga. App. 532, 667 S.E.2d 622 (2008).

Grant of continuance is an "order," etc.

It was the duty of a decedent's spouse to obtain a written order from the probate court granting the spouse's petition for year's support. Because the spouse failed to do so, the entire case, not just a caveat to the petition filed by the decedent's child, was automatically dismissed as a matter of law pursuant to O.C.G.A. § 9-2-60(b) five years after the last written order was filed on the spouse's petition. Clark v. Clark, 293 Ga. App. 309, 667 S.E.2d 103 (2008).

Effect of Dismissal

Notices of attorney's leaves of absences insufficient to avoid application of statute. — Pursuant to O.C.G.A. §§ 9-2-60(b) and 9-11-41(e), because an individual's negligence suit sat dormant when the trial court failed to enter any orders for eight years, the suit was automatically dismissed for want of prosecution, and the individual could not overcome application of those statutes as notices of leaves of absence filed by the individual's attorney were insufficient to avoid application. Ward v. Swartz, 285 Ga. App. 788, 648 S.E.2d 114 (2007).

9-2-61. Renewal of case after dismissal.

Law reviews. — For annual survey on trial practice and procedure, see 61 Mercer L. Rev. 363 (2009). For annual survey on trial practice and procedure, see 64 Mercer L. Rev. 305 (2012).

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Construction with federal statute. — Georgia Court of Appeals has adopted the grace period approach and construed 28 U.S.C. § 1367(d) as allowing state law claims that would otherwise be time-barred to be refiled in state court, if the claims are refiled no later than 30 days after federal court dismissal. Gottschalk v. Woods, 329 Ga. App. 730, 766 S.E.2d 130 (2014).

Renewal precluded if requisite expert affidavit was not filed in prior action.

Trial court did not err in dismissing with prejudice a patient's medical malpractice action on the ground that the patient failed to attach the required affidavits under O.C.G.A. § 9-11-9.1, because O.C.G.A. §§ 9-2-61(a) and 9-11-9.1 did not allow amendments of complaints in order to attach affidavits; dismissals for failure to attach such affidavits were dismissals for failure to state a claim and were, therefore, on the merits and with prejudice. Roberson v. Northrup, 302 Ga. App. 405, 691 S.E.2d 547 (2010).

Service on uninsured motorist carrier. — When insured brought suit against a driver for negligence, but did not serve the insured's excess uninsured motorist (UM) carrier under O.C.G.A. § 33-7-11 until after renewing the suit under O.C.G.A. § 9-2-61, it was error to grant summary judgment to the excess carrier on ground that service was untimely; purpose of § 33-7-11(d) is to provide notice to a UM carrier, not to obtain personal jurisdiction over it or to make it a party defendant, and service on a UM carrier was permissible at any time within which valid service could be made on the defendant. Hayward v. Retention Alternatives, Ltd., 291 Ga. App. 232, 661 S.E.2d 862 (2008), aff'd, Retention Alternatives, Ltd. v. Hayward, 285 Ga. 437, 678 S.E.2d 877 (2009).

Uninsured motorist (UM) insurer was timely served in an insured's renewal action, and summary judgment for the insurer was error because service on a UM carrier under O.C.G.A. § 33-7-11 was valid and timely within any time allowed for valid service on the tortfeasor in the case, even if such valid service was after the expiration of the statute of limitation; nothing in the 1998 amendment to § 33-7-11 reflected a legislative decision to overrule any of the judicial decisions holding such service valid. Although the insured had voluntarily dismissed the initial suit, the insured timely renewed the action pursuant to O.C.G.A. § 9-2-61, and served the insurer with the renewed complaint. Retention Alternatives, Ltd. v. Hayward, 285 Ga. 437, 678 S.E.2d 877 (2009).

Claims dismissed under section. — Because the children of a decedent refiled their complaint against the operators of a nursing home more than five years after the death of their mother or the alleged wrongful acts occurred, their claims were subject to dismissal under the statute of repose of O.C.G.A. § 9-3-71(b). Carr v. Kindred Healthcare Operating, Inc., 293 Ga. App. 80, 666 S.E.2d 401 (2008).

Trial court did not err in dismissing a passenger's O.C.G.A. § 9-2-61 renewal action entirely as being void ab initio and in

General Consideration (Cont'd)

denying the passenger's request to substitute parties under O.C.G.A. § 9-11-25 because the passenger's renewed complaint was filed after the driver's death, and the passenger never attempted to substitute a new defendant before a hearing on a motion to dismiss. Cox v. Progressive Bayside Ins. Co., 316 Ga. App. 50, 728 S.E.2d 726 (2012).

Renewal can only be exercised once. — In a wrongful death action, a trial court properly granted summary judgment to two defending prison workers because the estate administrator for the deceased inmate had already exercised the right to one renewal of the action outside the statute of limitation authorized by O.C.G.A. § 9-2-61(a) and could not invoke the statute again to save the time-barred third complaint after a federal court declined to exercise pendent jurisdiction over the state claims. Stokes v. Hill, 324 Ga. App. 256, 749 S.E.2d 819 (2013).

Cited in Slone v. Myers, 288 Ga. App. 8, 653 S.E.2d 323 (2007); Brito v. Gomez Law Group, LLC, 289 Ga. App. 625, 658 S.E.2d 178 (2008); Holmes & Co. v. Carlisle, 289 Ga. App. 619, 658 S.E.2d 185 (2008); Batesville Casket Co. v. Watkins Mortuary, Inc., 293 Ga. App. 854, 668 S.E.2d 476 (2008); Long v. Greenwood Homes, Inc., 285 Ga. 560, 679 S.E.2d 712 (2009); Cleveland v. Katz, 311 Ga. App. 880, 717 S.E.2d 500 (2011); Ga. Reg'l Transp. Auth. v. Foster, 329 Ga. App. 258, 764 S.E.2d 862 (2014); Gala v. Fisher, 770 S.E.2d 879, No. S14G0919, 2015 Ga. LEXIS 198 (2015).

Procedural Consideration

Renewal application to confirm arbitration award governed by O.C.G.A. § 9-2-61(c). — Corporation's original state court application to confirm an arbitration award was incapable of being renewed pursuant to O.C.G.A. § 9-2-61(a) because O.C.G.A. § 9-9-4(a)(1) required any application to the court under the Georgia Arbitration Code to be made in the superior court of the county where venue lies, and thus, the state court lacked subject matter jurisdiction over the corporation's original application; O.C.G.A. § 9-2-61(c) provided the only avenue by which the corporation could have resurrected the corporation's original void action under the renewal statute. Warehouseboy Trading, Inc. v. Gew Fitness, LLC, 316 Ga. App. 242, 729 S.E.2d 449 (2012).

Service in first action essential. Because sufficient evidence was presented that supported the trial court's ruling that service of process in a personal injury plaintiff's original suit was ineffectual, that suit was void, making dismissal of the personal injury plaintiff's renewal claim proper. Cooper v. Lewis, 288 Ga. App. 750, 655 S.E.2d 344 (2007).

Delay in service in original action. Court of appeals correctly reversed a trial court's grant of summary judgment to a driver and a corporation based on a second driver's lack of diligence in serving a complaint in the driver's voluntarily dismissed original action because inasmuch as diligence in perfecting service of process in an action properly refiled under O.C.G.A. § 9-2-61(a) had to be measured from the time of filing the renewed suit, any delay in service in a valid first action was not available as an affirmative defense in the renewal action. The first driver and corporation essentially sought the rewriting of an unambiguous statute, but their arguments were properly directed to the General Assembly because when the General Assembly wished to put a firm deadline on filing lawsuits, the legislature knew how to enact a statute of repose instead of a statute of limitation. Robinson v. Boyd, 288 Ga. 53, 701 S.E.2d 165 (2010).

Effect of service beyond limitation period. Plaintiff was allowed to reinstate an original 42 U.S.C. § 1983 complaint under Fed. R. Civ. P. 60(b) because of excusable neglect due to the fact that the renewal statute of O.C.G.A. § 9-2-61 was inapplicable to reinstate a second action barred by the limitations period of O.C.G.A. § 9-3-33, adequate grounds for relief were demonstrated, and no prejudice was shown. Highsmith v. Thomas, No. CV507-04, 2007 U.S. Dist. LEXIS 28964 (S.D. Ga. Apr. 18, 2007).

Motion to dismiss renewal application should have been treated as one for summary judgment. — Because a corporation's renewed application did not indicate whether the corporation's state court action was dismissed for lack of subject matter jurisdiction, the superior court clearly considered matters beyond the corporation's renewed application in ruling on a limited liability company's (LLC) motion to dismiss; therefore, the LLC's motion should have been treated as one for summary judgment and disposed of as provided in O.C.G.A. § 9-11-56. Warehouseboy Trading, Inc. v. Gew Fitness, LLC, 316 Ga. App. 242, 729 S.E.2d 449 (2012).

Assertion of new claim in renewal action was improper. — Plaintiff's renewal action against the mother of a driver in a traffic accident was time-barred because it asserted a claim under the family purpose doctrine, but the original action against the mother only asserted a negligence claim against the mother and did not make a family purpose doctrine allegation; to be a good "renewal" so as to suspend the running of the statute of limitations under O.C.G.A. § 9-2-61, the new petition had to have been substantially the same both as to the cause of action and as to the essential parties. Thus, the statute of limitations was not suspended under § 9-2-61. Safi-Rafiq v. Balasubramaniam, 298 Ga. App. 274, 679 S.E.2d 822 (2009).

Action appealed from magistrate court. — O.C.G.A. § 9-11-41(a), the voluntary dismissal statute, could be exercised by either party in a de novo appeal filed in superior court following the entry of a judgment in themagistrate court, regardless of which party appealed. Once a landlord filed the landlord's voluntary dismissal, the landlord was also entitled to file a renewal action pursuant to O.C.G.A. § 9-2-61(a). Jessup v. Ray, 311 Ga. App. 523, 716 S.E.2d 583 (2011).

Timing

Computation method. — Method of computation of time in O.C.G.A. § 1-3-1(d)(3) applies to the filing of renewal actions under O.C.G.A. § 9-2-61(a). Parsons v. Capital Alliance Fin., LLC, 325 Ga. App. 884, 756 S.E.2d 14 (2014).

Time ran from court order terminating the action. — Plaintiff's renewal action brought under the renewal statute, O.C.G.A. § 9-2-61(a), was timely because the six-month period was calculated not from the time the plaintiff dismissed some of the defendants, but from the date of the trial court's order granting the voluntary dismissal without prejudice as to all but one of the defendants. Had the plaintiff dismissed all the defendants, no court order would have been required, and the voluntary dismissal would have been effective. Gresham v. Harris, 329 Ga. App. 465, 765 S.E.2d 400 (2014).

Failure to serve complaint before renewal period expired. — Trial court did not err in granting summary judgment to the insurer because the insured served the insured's complaint on the insurer a month after the six-month renewal period expired and the insured had made no prior attempts to perfect service. King v. Peeples, 328 Ga. App. 814, 762 S.E.2d 817 (2014).

Appeal was timely and proper.

Trial court erred by denying a debtor's refiling of an appeal as untimely because the six-month period for filing the debtor's renewal action under O.C.G.A. § 9-2-61(a) began the day after the debtor dismissed the original superior court action, and ran until December 6, 2012, based on the method of calculation under O.C.G.A. § 1-3-1(d)(3), thus, the refiling of the action on December 6 was timely. Parsons v. Capital Alliance Fin., LLC, 325 Ga. App. 884, 756 S.E.2d 14 (2014).

Action was time barred. — Trial court did not err by finding that a parent's wrongful death claim, pursuant to O.C.G.A. § 9-2-61(a) and (c), was time-barred because the parent was not a party to the original action filed in federal court except as the representative of the son's estate; in the state court case, the estate lacked standing to bring the wrongful death claim, and the parent's claims in the parent's individual capacity were barred by the applicable two-year statute of limitations because the parent could not benefit from the renewal statute since the parent, individually, was not a party to the first action. Gish v. Thomas, 302 Ga. App. 854, 691 S.E.2d 900 (2010).

Timing (Cont'd)

Resident's third automobile personal injury lawsuit against a former resident was properly dismissed because service of the resident's second lawsuit was not perfected in accordance with the Georgia Long-Arm Statute, O.C.G.A. § 9-10-91, and the period of limitations in O.C.G.A. § 9-3-33 ran before the third lawsuit (allegedly as a renewal of the second lawsuit under O.C.G.A. § 9-2-61) was filed. Coles v. Reese, 316 Ga. App. 545, 730 S.E.2d 33 (2012).

Trial court properly dismissed the plaintiff's claims on the ground that the claims were time-barred because the claims were untimely, whether viewed under Georgia's renewal statute O.C.G.A. § 9-2-61(a), or under the tolling provision of 28 U.S.C. § 1367(d), because under Georgia's renewal statute, the plaintiff was required to file the renewal action within six months of the federal appellate court's affirmance of the district court's dismissal of the first lawsuit. Gottschalk v. Woods, 329 Ga. App. 730, 766 S.E.2d 130 (2014).

Statute of limitation tolled. — Superior court erred in granting a motion to dismiss a corporation's renewal proceeding to confirm an arbitration award on the ground that it was barred by the one-year statute of limitation contained in O.C.G.A. § 9-9-12 because the application to confirm the award was a valid renewal action under O.C.G.A. § 9-2-61(c), thereby tolling the one-year statute of limitation; the corporation's original state court application to confirm the award was dismissed for lack of subject matter jurisdiction. Warehouseboy Trading, Inc. v. Gew Fitness, LLC, 316 Ga. App. 242, 729 S.E.2d 449 (2012).

Application

Section not applicable to action brought after running of original statute of limitation.

In an employment discrimination case dismissed without prejudice because the former employee had not effected service within 120 days, a district court's dismissal of the Discrimination in Employment Act of 1967 (ADEA), Title VII of the Civil Rights Act of 1964 (Title VII), and American with Disabilities Act (ADA) claims in the former employee's second complaint was affirmed. The former employee's argument that the second complaint was timely renewed pursuant to O.C.G.A. § 9-2-61 was without merit since the ADEA, Title VII, and the ADA each a had 90-day statutory limitation period in which to file suit, and the former employee had not satisfied those statutory limitation periods. Miller v. Georgia, No. 06-14138, 2007 U.S. App. LEXIS 6218 (11th Cir. Mar. 15, 2007) (Unpublished).

Failure to exercise due diligence. — As the evidence presented failed to support a finding that plaintiff acted with due diligence in serving the defendant with a renewed damages complaint filed pursuant to O.C.G.A. § 9-2-61(a), or that the defendant tried to evade service, and although problems with service existed, the plaintiff presented few facts regarding the efforts made to complete service, the action was properly dismissed on service of process grounds. Fusco v. Tomlin, 285 Ga. App. 819, 648 S.E.2d 137 (2007).

Consolidated personal injury renewal actions filed by a parent and child were properly resolved against them based on their failure to use diligence in serving a driver as no efforts were made to locate the driver even after the driver filed lack of service defenses. At that point the greatest diligence in serving the driver was required because the statute of limitations had run. Dickson v. Amick, 291 Ga. App. 557, 662 S.E.2d 333 (2008).

Renewal action properly dismissed.

In a case in which a former employee's second complaint was not filed within the 90-day limitations period set forth in 29 U.S.C. § 626(e) and 42 U.S.C. § 2000e-5(f)(1) after the employee received a right-to-sue notice from the Equal Employment Opportunity Commission, dismissal of the former employee's second complaint alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq., was affirmed because Georgia's renewal statute, O.C.G.A. § 9-2-61(a), was inapplicable. Roberts v. Georgia, No. 06-14137, 2007

U.S. App. LEXIS 8005 (11th Cir. Apr. 6, 2007) (Unpublished).

In an employment discrimination case in which a former employee's initial complaint was dismissed without prejudice because the former employee had not effected service within 120 days, a district court's dismissal of the former employee's 42 U.S.C. §§ 1983 and 1985 claims in a second complaint was affirmed because the claims were not timely under O.C.G.A. § 9-3-33, the Georgia statute borrowed for 42 U.S.C. §§ 1983 and 1985 claims. Since the former employee's initial complaint had been dismissed by court order granting defendants' motions, the former employee's initial suit was void and incapable of renewal under O.C.G.A. § 9-2-61. Miller v. Georgia, No. 06-14138, 2007 U.S. App. LEXIS 6218 (11th Cir. Mar. 15, 2007) (Unpublished).

Passenger's personal injury action against a driver renewed pursuant to O.C.G.A. § 9-2-61(a) was dismissed for failure to perfect service of process against the driver due to lack of diligence. Although the passenger attempted to serve the driver for several months, the passenger then allowed 72 days to elapse before making another attempt. The court rejected the passenger's contention that O.C.G.A. § 33-7-11(e), providing for personal service after service of publication while allowing litigation against an uninsured motorist carrier to proceed, allowed for an additional 12 months after service by publication. Williams v. Patterson, 306 Ga. App. 624, 703 S.E.2d 74 (2010).

Arbitration not proceeding that could be renewed. — Trial court should have dismissed an employee's tort claims against a supervisor because an arbitration between them and their employer was not a proceeding that could be renewed under O.C.G.A. § 9-2-61(a), and the claims were untimely under O.C.G.A. § 9-3-33 since the claims were not filed within six months of the dismissal or discontinuation of the employee's earlier federal action. Green v. Flanagan, 317 Ga. App. 152, 730 S.E.2d 161 (2012).

Third complaint was first renewal action. — Vehicle passenger's third complaint, filed after the passenger had voluntarily dismissed the passenger's first two complaints, was the passenger's first renewal action and was authorized under O.C.G.A. § 9-2-61(a). The second complaint, which was filed while the first complaint was pending and during the limitations period, was not a renewal of a dismissed action, but a duplicate action. Shy v. Faniel, 292 Ga. App. 253, 663 S.E.2d 841 (2008).

Trial court erred when the court granted a nonresident's motion to dismiss a driver's third complaint because the dismissal of the driver's second federal complaint was involuntary under O.C.G.A. § 9-11-41(a)(2), rather than voluntary under § 9-11-41(a)(1), and could not operate as an adjudication on the merits under § 9-11-41(a)(3); even though the driver requested the dismissal of the federal action, the dismissal itself was by an order of the federal court for a failure of the court's own jurisdiction. Crawford v. Kingston, 316 Ga. App. 313, 728 S.E.2d 904 (2012).

Trial court erred when the court granted a nonresident's motion to dismiss a driver's third complaint because the complaint was not barred by O.C.G.A. § 9-2-61 since the driver never served the nonresident with the second federal complaint, and thus, it was void and could not amount to a renewal of the first complaint; the third complaint was intended as a renewal of the first complaint, which was voluntarily dismissed after the expiration of the applicable period of limitation, and the federal dismissal was not only involuntary but also dismissed without prejudice for lack of subject matter jurisdiction. Crawford v. Kingston, 316 Ga. App. 313, 728 S.E.2d 904 (2012).

Void actions cannot be renewed.

In a personal injury suit arising from the slip and fall by the injured party, because the trial court dismissed the injured party's first action as void for failure to perfect service, the second action could not amount to a renewal action under O.C.G.A. § 9-2-61(a); further, given that the second complaint disclosed on its face that the action was time-barred, it was correctly dismissed pursuant to O.C.G.A. § 9-3-33. Baxley v. Baldwin, 287 Ga. App. 245, 651 S.E.2d 172 (2007).

In a case in which a former employee's

Application (Cont'd)

first complaint was authorized to be dismissed pursuant to Fed. R. Civ. P. 4(m), dismissal of the former employee's second complaint alleging violations of, inter alia, 42 U.S.C. §§ 1983 and 1985 was affirmed because Georgia's renewal statute was inapplicable. The first complaint was void for purposes of O.C.G.A. § 9-2-61(a). Roberts v. Georgia, No. 06-14137, 2007 U.S. App. LEXIS 8005 (11th Cir. Apr. 6, 2007) (Unpublished).

Georgia's tolling provision for "renewal actions" under O.C.G.A. § 9-2-61(a) did not apply since the first 42 U.S.C. § 1983 action was void because service was never perfected on defendants. Wilson v. Hamilton, 2005 U.S. App. LEXIS 8530 (11th Cir. May 6, 2005) (Unpublished).

Because dismissal of a medical malpractice suit for failure to comply with the expert affidavit requirements rendered the suit void and incapable of being renewed under O.C.G.A. § 9-2-61, and the two-year limitation period in O.C.G.A. § 9-3-71(a) had expired, the suit was properly dismissed. Hendrix v. Fulton DeKalb Hosp. Auth., 330 Ga. App. 833, 769 S.E.2d 575 (2015).

Third complaint not an attempt at renewing void action. — In filing a third complaint after voluntarily dismissing two previous complaints, a vehicle passenger was not trying to renew a void action. The third complaint explicitly stated that the complaint was intended as a renewal of the first suit, in which service had been perfected, and not of the second suit, in which service had not been perfected. Shy v. Faniel, 292 Ga. App. 253, 663 S.E.2d 841 (2008).

Since the complaint was not served on defendant prior to dismissal, etc.

Because an insured who brought a personal injury suit against an alleged tortfeasor had never personally served the alleged tortfeasor when the original action was filed, the action was not valid prior to dismissal and thus was not subject to renewal under O.C.G.A. § 9-2-61. Accordingly, the present action was time-barred under O.C.G.A. § 9-3-33. Williams v. Hunter, 291 Ga. App. 731, 662 S.E.2d 810 (2008).

Section applies only when action dismissed was valid.

Because a declaratory judgment action filed by parents against underwriters was dismissed for lack of standing, a nonamendable defect, there was no valid suit to be renewed under O.C.G.A. § 9-2-61. Mikell v. Certain Underwriters at Lloyds, London, 288 Ga. App. 430, 654 S.E.2d 227 (2007).

Voidable actions are renewable. — Absent any judicial determination that dismissal was required for lack of an approved bond, the petitioners were entitled to voluntarily dismiss their first request for certiorari, filed pursuant to O.C.G.A. § 5-4-1, relying on renewal statute codified at O.C.G.A. § 9-2-61(a), and file a second request after the 30-day limitation period had expired; moreover, the first petition was a valid action which was merely voidable and not void. Buckler v. DeKalb County, 290 Ga. App. 190, 659 S.E.2d 398 (2008).

Based on O.C.G.A. § 9-11-9.1 and the renewal statute of O.C.G.A. § 9-2-61, the failure to file the required expert affidavit contemporaneously with a medical malpractice complaint does not render the complaint void ab initio but merely voidable and that the complaint can be renewed. Chandler v. Opensided MRI of Atlanta, LLC, 299 Ga. App. 145, 682 S.E.2d 165 (2009), aff'd, 287 Ga. 406, 696 S.E.2d 640 (2010).

Statute not applicable if claims plaintiff filed in first lawsuit were dismissed on merits. — Court of appeals affirmed a district court's judgment dismissing an action which an arrestee filed, pursuant to 42 U.S.C. § 1983, against a police officer and others because the action was filed more than two years after the arrestee was allegedly injured while being arrested, and the claim was untimely under O.C.G.A. § 9-3-33. The court rejected the arrestee's claims that the arrestee's lawsuit was timely under Georgia's renewal statute, O.C.G.A. § 9-2-61(a), and Fed. R. Civ. P. 15(c) based on the filing of an earlier lawsuit against the same police officer and defendants who were not named in this second lawsuit less than two years after the arrestee was arrested because the claims in the

original lawsuit were dismissed on the merits. Oduok v. Phillips, 2005 U.S. App. LEXIS 24958 (11th Cir. Nov. 18, 2005) (Unpublished).

Amendment to action brought by CEO and investment company against corporation related back. — Trial court did not err in refusing to dismiss, as time barred, a complaint brought by a CEO and an investment company against a corporation because, although originally filed as a declaratory judgment action, the CEO and the investment company filed an amendment seeking indemnification and a money judgment; since there had been no entry of a pretrial order, the amendment-expressly stating that no declaratory judgment was being sought-related back to the date the original complaint was filed in state court and the complaint was not a nullity. Thus, the claim was timely under the renewal statute, O.C.G.A. § 9-2-61(a). McKesson Corp. v. Green, 299 Ga. App. 91, 683 S.E.2d 336 (2009).

Equitable estoppel not relevant when failure to serve. — Court of appeals correctly reversed a trial court's grant of summary judgment to a driver and a corporation, which was based on a second driver's lack of diligence in serving the second driver's personal injury complaint in the second driver's voluntarily dismissed original action because that driver was not equitably estopped from proceeding with the driver's renewal action; the first driver and corporation did not allege an affirmative act of deception, and to the extent that the second driver had a duty to speak to them, it was to inform them of the lawsuit, but that duty was defined by the Georgia Code, which included the renewal statute, O.C.G.A. § 9-2-61. Robinson v. Boyd, 288 Ga. 53, 701 S.E.2d 165 (2010).

Same cause of action required.

Based on O.C.G.A. § 9-2-61, an arrestee's excessive force claim against a sheriff's major in the major's individual capacity was revived after a voluntary dismissal but assuming that the complaint alleged actual malice under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d), as to the major's conduct, the tort claim had to be brought against the state under O.C.G.A. § 50-21-25(b); however, the state did not waive the state's sovereign immunity under O.C.G.A. § 50-21-23(b) for such claim to be brought in federal court. Jude v. Morrison, 534 F. Supp. 2d 1365 (N.D. Ga. 2008).

Assertion of same claims. — Trial court did not err by concluding that the claims in a renewed action were sufficiently similar to the original claims against a corporation's executive officer (CEO) so that the statute of limitation was tolled under the renewal statute, O.C.G.A. § 9-2-61(a), because in both complaints the plaintiffs claimed the same allegations against the CEO. Cushing v. Cohen, 323 Ga. App. 497, 746 S.E.2d 898 (2013).

Section inapplicable in federal court actions.

Since the employee's discrimination suit against the employer was based on Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e et seq., the court rejected the employee's contention that state law, not federal law, governed the voluntary dismissal of the employee's complaint and that O.C.G.A. § 9-2-61(a) afforded the employee a second chance to file the employee's original complaint as long as the employer received notice of the lawsuit. The suit was filed pursuant to Title VII, a federal law that contained a statute of limitations. Weldon v. Elec. Data Sys. Corp., 2005 U.S. App. LEXIS 7961 (11th Cir. May 4, 2005) (Unpublished).

Dismissal of action for failure to pay previous fees and costs. — When the consumer's products liability action was dismissed without prejudice under Fed. R. Civ. P. 41(a)(2), the dismissal order indicated that the manufacturer was entitled to fees and costs; when the consumer refiled the action, the district court abused the court's discretion by dismissing the action because the consumer had not paid fees and costs. The prior voluntary dismissal order indicated only that the manufacturer was entitled to the manufacturer's attorney's fees and costs and that the next court should resolve the fee/cost petition; the consumer was not prohibited from refiling the action under O.C.G.A. § 9-2-61. Parrish v. Ford Motor

Application (Cont'd)

Co., No. 08-13156, 2008 U.S. App. LEXIS 22712 (11th Cir. Oct. 31, 2008) (Unpublished).

Section applied and permitted renewal when affidavit was mistakenly omitted.

Trial court erred by dismissing a couple's renewed negligence complaint for failing to file an expert affidavit with the couple's original complaint as required by O.C.G.A. § 9-11-9.1(a) because the record failed to contain sufficient findings showing whether any professional negligence was involved with regard to the wife falling from a testing table as it was merely speculative whether the technician had to assess the wife's medical condition in order to decide whether she could get down from a raised table since it could have been that no professional judgment was required. The trial court additionally erred by dismissing the couple's renewed complaint because the defending medical entities waived their objection to the renewal by failing to file a separate motion to dismiss contemporaneously with their answer to the couple's original action. Chandler v. Opensided MRI of Atlanta, LLC, 299 Ga. App. 145, 682 S.E.2d 165 (2009), aff'd, 287 Ga. 406, 696 S.E.2d 640 (2010).

Executor's renewal action. — In the absence of an explicit order in an executor's renewal action, O.C.G.A. § 9-2-61(a), requiring the executor to identify the executor's expert witnesses by a date certain, the executor's failure to do so did not warrant the extreme sanction of dismissal under O.C.G.A. § 9-11-41(b), (c). Porter v. WellStar Health Sys., 299 Ga. App. 481, 683 S.E.2d 35 (2009), cert. denied, No. S09C2031, 2010 Ga. LEXIS 80 (Ga. 2010).

Untimely service of process in first action not a defense in renewal action. — Because defendants were timely served in a renewal action brought under O.C.G.A. § 9-2-61(a), the defendants could not assert as a defense the fact that the defendants were served five years after the initial action, which had been dismissed following service of defendants. The equitable doctrine of laches, O.C.G.A. § 9-3-3, did not apply in a personal injury action because the action was a legal action. Boyd v. Robinson, 299 Ga. App. 795, 683 S.E.2d 862 (2009), aff'd, 288 Ga. 53, 701 S.E.2d 165 (2010).

Renewal proper. — Because a health care provider simply raised a patient's failure to comply with O.C.G.A. § 9-11-9.1(a) as a defense in the provider's answer rather than in a contemporaneous motion to dismiss, as required by § 9-11-9.1(c), the patient was not precluded from renewing a negligence action pursuant to O.C.G.A. § 9-2-61. Opensided MRI of Atlanta, LLC v. Chandler, 287 Ga. 406, 696 S.E.2d 640 (2010).

CHAPTER 3

LIMITATIONS OF ACTIONS

Article 2

Specific Periods of Limitation

Sec.

Article 4

Limitations for Malpractice Actions

Article 5

Tolling of Limitations

ARTICLE 1

GENERAL PROVISIONS

9-3-3. Applicability of limitation statutes; equitable bar.

JUDICIAL DECISIONS

Equitable doctrine of laches. Trial court did not abuse the court's discretion in entering an interlocutory injunction to preserve the status quo pending adjudication of the merits of the creditor's action against the debtors alleging breach of contract and fraudulent transfers in violation of the Georgia Uniform Fraudulent Transfers Act, O.C.G.A. § 18-2-70 et seq., because the debtors presented no evidence of harm from the creditor's delay in amending its complaint to seek an interlocutory injunction, and the delay resulted primarily from the debtors' concealment of their actions and obstruction of the creditor's efforts to discover the details. Vague assertions of harm supported by no citation to evidence in the record are insufficient to sustain a defense of laches, and there is a balance between a plaintiff's knowing that a cause of action exists and that interim injunctive relief may be needed and sitting on its rights to the prejudice of the defendant. SRB Inv. Servs., LLLP v. Branch Banking & Trust Co., 289 Ga. 1, 709 S.E.2d 267 (2011).

Laches not available in legal action. — Because defendants were timely served in a renewal action brought under O.C.G.A. § 9-2-61(a), the defendants could not assert as a defense the fact that the defendants were served five years after the initial action, which had been dismissed following service of defendants. The equitable doctrine of laches, O.C.G.A. § 9-3-3, did not apply in a personal injury action because the action was a legal action. Boyd v. Robinson, 299 Ga. App. 795, 683 S.E.2d 862 (2009), aff'd, 288 Ga. 53, 701 S.E.2d 165 (2010).

Quiet title actions. — Trial court did not err in failing to rule that a railroad's petition to quiet title was barred by laches as no evidence was presented regarding when the railroad became aware of the contestant's affidavits of possession, the reason for the railroad's delay in filing a petition to quiet title, whether the railroad could have acted sooner than it did, and whether any evidence was lost due to the delay. Thompson v. Cent. of Ga. R.R., 282 Ga. 264, 646 S.E.2d 669 (2007).

ARTICLE 2

SPECIFIC PERIODS OF LIMITATION

9-3-22. Enforcement of rights under statutes, acts of incorporation; recovery of wages, overtime, and damages.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Assignee's recovery of collateral under a life insurance policy. — Bank was properly granted summary judgment in an interpleader action involving competing claims between the bank and a widow to the proceeds of a life insurance policy as the decedent, the widow's spouse, had assigned the policy to the bank as collateral for a loan in 1977 and, despite having had the debt discharged in bankruptcy, the bank was not precluded to recover the bank's collateral. Further, the bank's right to recover did not accrue until the decedent's death; therefore, the statutes of limitation had not expired. Miller v. Branch Banking & Trust Co., 292 Ga. App. 189, 663 S.E.2d 756 (2008).

Rights Under Statutes

Contribution and indemnity for subcontractor. — Subcontractor's claim against a consultant for contribution was given by statute, O.C.G.A. § 51-12-32(a), and the subcontractor's claim for indemnity arose by operation of law. Therefore, the subcontractor's suit for contribution and indemnity against the consultant was a claim to enforce rights that accrued by operation of law or a statute and was subject to a 20-year statute of limitations under O.C.G.A. § 9-3-22. Saiia Constr., LLC v. Terracon Consultants, Inc., 310 Ga. App. 713, 714 S.E.2d 3 (2011).

Recovery for Wages, Overtime, and Other Employment Issues

Action by retired teachers regarding amount of benefits under employment contract. — As a class of retirees had a right to retirement pay from the Teachers Retirement System of Georgia that arose from their contracts of employment and not from a statutory right, the six-year limitations period of O.C.G.A. § 9-3-24 applicable to contract matters was controlling; the 20-year limitations period of O.C.G.A. § 9-3-22 was not the correct limitations period to apply in the circumstances. Teachers Ret. Sys. v. Plymel, 296 Ga. App. 839, 676 S.E.2d 234 (2009).

Action by migrant farm workers. — In a class action in which migrant farm workers' state law breach of contract claims against farmers were in reality wages or contract for wages set by statute, farmers' motion to dismiss the state law claims was granted as to claims before 2004, as they were barred by the two-year statute of limitations in O.C.G.A. § 9-3-22. Antonio-Candelaria v. Gibbs Farms, Inc., No. 1:06-CV-39 (WLS), 2008 U.S. Dist. LEXIS 16295 (M.D. Ga. Mar. 4, 2008).

Plaintiffs, who were Mexican temporary farm workers, filed a breach of contract claim against defendant employer, alleging the employer violated the terms of an immigration clearance order, which prom-

ised compliance with all employment-related law and reimbursement for certain expenses and payment of wages on a weekly basis, the six-year statute of limitations for simple contracts, provided by O.C.G.A. § 9-3-24, applied to such claims, rather than the two-year limitations period of O.C.G.A. § 9-3-22 as to payment of wages because regulations governing the worker program expressly stated that the job clearance order created a contract between the employer and the worker, thus invoking the six-year statute of limitations specified in § 9-3-24. Ramos-Barrientos v. Bland, No. 606CV089, 2010 U.S. Dist. LEXIS 22921 (S.D. Ga. Mar. 12, 2010).

9-3-23. Sealed instruments.

Law reviews. — For article, "Construction Law," see 63 Mercer L. Rev. 107 (2011).

JUDICIAL DECISIONS

Sealed amendments to unsealed contract did not render the contract one under seal. — Contract for the sale of an office building was not a contract under seal to which the 20-year statute of limitations of O.C.G.A. § 9-3-23 applied, but was governed by the 6-year statute of limitations, O.C.G.A. § 9-3-24, because, although the agreement recited that it was under seal, the word "Seal" did not appear next to the signatures. Five amendments to the agreement, which were executed under seal, did not convert the existing agreement into a contract under seal because there was no evidence the parties intended such a conversion. Perkins v. M&M Office Holdings, LLC, 303 Ga. App. 770, 695 S.E.2d 82 (2010).

Recital in note plus notation "seal" after signatures sufficient. — Note that stated that the note was "given under the hand and seal of each of the undersigned" and the appearance of the notation "(seal)" after the debtors' signatures rendered the document one under seal and subject to a 20-year statute of limitations. Thomas v. Summers, 329 Ga. App. 250, 764 S.E.2d 578 (2014).

Assignee's recovery of collateral under a life insurance policy. — Bank was properly granted summary judgment in an interpleader action involving competing claims between the bank and a widow to the proceeds of a life insurance policy as the decedent, the widow's spouse, assigned the policy to the bank as collateral for a loan in 1977 and, despite having the debt discharged in bankruptcy, the bank was not precluded to recover the bank's collateral. Further, the bank's right to recover did not accrue until the decedent's death; therefore, the statutes of limitation had not expired. Miller v. Branch Banking & Trust Co., 292 Ga. App. 189, 663 S.E.2d 756 (2008).

9-3-24. Actions on simple written contracts; exceptions.

Law reviews. — For survey article on construction law, see 60 Mercer L. Rev. 59 (2008). For annual survey on insurance, see 61 Mercer L. Rev. 179 (2009). For annual survey of law on construction law, see 62 Mercer L. Rev. 71 (2010). For annual survey on construction law, see 65 Mercer L. Rev. 67 (2013).

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Inapplicable when limitation period contained in contract. — Heating system customer's claim that a letter agreement that contained no period of limitation meant that the parties' contract, which contained a one-year limitation period, was inapplicable and that O.C.G.A. § 9-3-24 applied instead lacked merit as the letter agreement predated the parties' contract. Carrier Corp. v. Rollins, Inc., 316 Ga. App. 630, 730 S.E.2d 103 (2012).

Statute of limitation applies to breach of written contract.

Professional malpractice claim premised on a written contract is governed by the six-year statute of limitation in O.C.G.A. § 9-3-24. Newell Recycling of Atlanta, Inc. v. Jordan Jones & Goulding, Inc., 317 Ga. App. 464, 731 S.E.2d 361 (2012).

Sealed amendments to unsealed contract did not render the original contract one under seal. — Contract for the sale of an office building was not a contract under seal to which the 20-year statute of limitations of O.C.G.A. § 9-3-23 applied, but was governed by the 6-year statute of limitations, O.C.G.A. § 9-3-24, because, although the agreement recited that it was under seal, the word "Seal" did not appear next to the signatures. Five amendments to the agreement, which were executed under seal, did not convert the existing agreement into a contract under seal because there was no evidence the parties intended such a conversion. Perkins v. M&M Office Holdings, LLC, 303 Ga. App. 770, 695 S.E.2d 82 (2010).

Cited in Hook v. Bergen, 286 Ga. App. 258, 649 S.E.2d 313 (2007); Cochran Mill Assocs. v. Stephens, 286 Ga. App. 241, 648 S.E.2d 764 (2007); Antonio-Candelaria v. Gibbs Farms, Inc., No. 1:06-CV-39 (WLS), 2008 U.S. Dist. LEXIS 16295 (M.D. Ga. Mar. 4, 2008); Maree v. ROMAR Joint Venture, 329 Ga. App. 282, 763 S.E.2d 899 (2014).

Actions on Simple Written Contracts

Limitation applicable to provisions implied in contract by operation of law.

Court of Appeals erred in holding that a professional malpractice claim premised on a written contract between an engineering firm and the firm's client was governed by the four-year statute of limitations in O.C.G.A. § 9-3-25, rather than the six-year statute of limitations in O.C.G.A. § 9-3-24. Newell Recycling of Atlanta, Inc. v. Jordan Jones & Goulding, Inc., 288 Ga. 236, 703 S.E.2d 323 (2010).

Action to collect unpaid credit card debt. — Because an action filed by a creditor to collect unpaid credit card charges was based on a written contract, and not an open account, the trial court properly held that the six-year limitations period under O.C.G.A. § 9-3-24 applied, supporting summary judgment in the creditor's favor; moreover, because the transaction at issue was a written contract, the form of the debtor's acceptance was immaterial. Hill v. Am. Express, 289 Ga. App. 576, 657 S.E.2d 547 (2008), cert. denied, 2008 Ga. LEXIS 490 (Ga. 2008).

Claim based on construction contract.

Trial court properly granted summary judgment in a breach of contract claim to a construction company and one of the company's representatives as the suing homeowner had brought suit in 2007, and the work on the interior of the home was substantially completed in 1999; thus, the suit was barred by the six year limitation period set forth in O.C.G.A. § 9-3-24. The suit did not sound in tort since the homeowner failed to allege any property damage and only sought repair/replacement damages. Wilks v. Overall Constr., Inc., 296 Ga. App. 410, 674 S.E.2d 320 (2009).

Action by retired teachers regarding amount of benefits under employment contract. — As a class of retirees had a right to retirement pay from the Teachers Retirement System of Georgia that arose from their contracts of employment and not from a statutory right, the six-year limitations period of O.C.G.A. § 9-3-24 applicable to contract matters was controlling; the 20-year limitations period of O.C.G.A. § 9-3-22 was not the correct limitations period to apply in the circumstances. Teachers Ret. Sys. v. Plymel, 296 Ga. App. 839, 676 S.E.2d 234 (2009).

Action under Employment Retirement Income Security Act. — Any

claim an employee may have had against an employer under the Employment Retirement Income Security Act (ERISA) was barred by the statute of limitations; because the action was brought in Georgia, the applicable statute of limitations was six years, pursuant to O.C.G.A. § 9-3-24 and the employee failed to file the employee's complaint within the six-year statute of limitations. Warren v. Schwerman, 2005 U.S. App. LEXIS 19089 (11th Cir. Aug. 31, 2005) (Unpublished).

Insurance contracts.

While a crop insurance policy's 12-month limitation period for bringing a legal action superseded O.C.G.A. § 9-3-24's six-year limitation period for actions on contracts, as the insured filed a demand for arbitration within 12 months of the insurer's denial of the claim, as required by the policy and applicable federal regulations, the insured had timely filed a "legal action." Therefore, the insured's subsequent lawsuit against the insurer was not time-barred. Bullington v. Blakely Crop Hail, Inc., 294 Ga. App. 147, 668 S.E.2d 732 (2008).

Farm quotas and impact on dissolution of family farm partnership. — In a dispute involving a family farm partnership, the trial court erred by granting summary judgment to the children/grandchildren as to the claim regarding the peanut and tobacco quotas and assignments where certain claims were not untimely because genuine issues of fact existed as to whether a son inappropriately used a power of attorney as to the quotas and assignments and the father/grandfather sought to recover damage to personalty. Godwin v. Mizpah Farms, LLLP, 330 Ga. App. 31, 766 S.E.2d 497 (2014).

Claim based on engineering contract. — Because a recycler's breach of contract claim was premised on a written contract for professional services and called into question the conduct of an engineering firm in the firm's area of expertise, it was a claim for professional malpractice that was subject to the four-year statute of limitation in O.C.G.A. § 9-3-25, rather than the six-year statute of limitations applicable to actions on written contracts in O.C.G.A. § 9-3-24. Jordan Jones & Goulding, Inc. v. Newell Recycling of Atlanta, Inc., 299 Ga. App. 294, 682 S.E.2d 666 (2009).

Engineering firm was properly granted summary judgment in a breach of contract suit because the three documents the customer claimed to form the written contract did not contain the essential element of consideration; thus, the parties' agreement was not a contract in writing and the four-year limitation period under O.C.G.A. § 9-3-25 applied and the suit was time barred. Newell Recycling of Atlanta, Inc. v. Jordan Jones & Goulding, Inc., 317 Ga. App. 464, 731 S.E.2d 361 (2012).

Running of Limitation

Time of breach, not time of damage or discovery, controlling.

Trial court properly concluded that a plaintiff's breach of contract claim was time-barred since the breach of the written contract at issue accrued in 1998 and the plaintiff waited until seven years later to file the complaint. Hamburger v. PFM Capital Mgmt., 286 Ga. App. 382, 649 S.E.2d 779 (2007).

Georgia's statute of limitations for actions to recover on a written contract did not bar them from drawing on the letters of credit because the insurers' right to draw on the letters of credit was not dependent on their ability to successfully bring a breach of contract action under the program agreements (by their terms, the letters of credit were clean and unconditional and the insurers' right to draw on them is independent of the program agreements); O.C.G.A. § 9-3-24 operated to bar only judicial remedies, but the statute did not affect the parties' substantive rights or bar non-judicial remedies. Williams Serv. Group v. Nat'l Union Fire Ins. Co., No. 11-14999, 2012 U.S. App. LEXIS 22004 (11th Cir. Oct. 23, 2012) (Unpublished).

Applicability.

Because the complaint was filed on July 1, 2011, to the extent the plaintiff's backward looking breach of contract claims arose before July 1, 2005, the claims were time-barred. Nebo Ventures, LLC v. NovaPro Risk Solutions, L.P., 324 Ga. App. 836, 752 S.E.2d 18 (2013).

Running of Limitation (Cont'd)

Accrual of actions. — Because a plaintiff alleged that the defendant, an investment advisory company, committed a breach of fiduciary duty by collecting management fees for certain stock after the stock was categorized as an unmanaged asset, and the categorization occurred some time between March 31, 2001, and June 20, 2001, the plaintiff's claim accrued within four years of the date of the filing of the complaint and was therefore timely; regardless of whether a four-year or a six-year statute of limitation period was applied, the trial court erred by granting summary judgment as to that particular claim on the ground that it was time-barred. Hamburger v. PFM Capital Mgmt., 286 Ga. App. 382, 649 S.E.2d 779 (2007).

Cause of action for breach of fiduciary duty accrues each time the defendant commits a wrongful act that causes appreciable damage. Hamburger v. PFM Capital Mgmt., 286 Ga. App. 382, 649 S.E.2d 779 (2007).

Trial court erred in finding that the agency agreement did not include a provision for indemnification. Because it did, and because the record did not show that more than six years elapsed between the date upon which the claims for indemnity accrued and the filing of this lawsuit, the trial court erred in granting partial summary judgment based on O.C.G.A. § 9-3-24. Old Republic Nat'l Title Ins. Co. v. Darryl J. Panella, LLC, 319 Ga. App. 274, 734 S.E.2d 523 (2012).

Tobacco farmers' suit time barred. — Trial court properly dismissed the tobacco farmers' suit for specific performance as time barred because one of the farmers testified that the last application for common stock was in the 1990s and, since the instant lawsuit was filed in 2007, well after the applicable limitation period ran, the claim for specific performance was barred. Rigby v. Flue-Cured Tobacco Coop. Stabilization Corp., 327 Ga. App. 29, 755 S.E.2d 915 (2014).

Divisible sublease. — Because a sublessee failed to file its claims under a divisible sublease within the six-year period after they arose, pursuant to the requirements of O.C.G.A. § 9-3-24, and a different limitations period applicable to construction contracts and express warranties did not apply, partial summary judgment to the sublessor as to the time-barred claims was properly entered. New Morn Foods, Inc. v. B & B Egg Co., 286 Ga. App. 29, 648 S.E.2d 428 (2007).

Immigrant workers' claims. — When plaintiff Mexican temporary farm workers filed a breach of contract claim against defendant employer, alleging the employer violated the terms of an immigration clearance order, which promised compliance with all employment-related law and reimbursement for certain expenses and payment of wages on a weekly basis, the six-year statute of limitations for simple contracts, provided by O.C.G.A. § 9-3-24, applied to such claims, rather than the two-year limitations period of O.C.G.A. § 9-3-22 as to payment of wages because regulations governing the worker program expressly stated that the job clearance order created a contract between the employer and the worker, thus invoking the six-year statute of limitations specified in § 9-3-24. Ramos-Barrientos v. Bland, No. 606CV089, 2010 U.S. Dist. LEXIS 22921 (S.D. Ga. Mar. 12, 2010).

Disability insurance contracts.

Trial court did not err in finding that a retirement plan participant's breach of contract action, which was related to the denial of the participant's claim for disability benefits, was barred by the six-year statute of limitation contained in O.C.G.A. § 9-3-24 because the participant brought the participant's claim for benefits under a retirement plan more than six years after those benefits became due and payable; the six-year statute of limitation began to run when the participant received a Social Security award because at that point, the participant satisfied the conditions precedent for disability benefits, and those benefits became due and payable under the retirement plan. Paschal v. Fulton-Dekalb Hosp. Auth. Emples. Ret. Plan, 305 Ga. App. 6, 699 S.E.2d 357 (2010).

Inapplicable to fire insurance policy with express contrary language. — One-year time-to-sue clause in an in-

sured's homeowner's insurance policy was clear and unambiguous, and it was not tolled during the 60-day loss payment period; as the insured's suit was not filed within the one-year period from the date of loss, as required in the policy, the insured's action against the insurer was properly dismissed. The limitations period pursuant to O.C.G.A. § 9-3-24 was not controlling due to the clear and unambiguous policy language. Thornton v. Ga. Farm Bureau Mut. Ins. Co., 287 Ga. 379, 695 S.E.2d 642 (2010).

Action against builder time barred. Because a belated claim filed against an alleged homebuilder's partner did not relate back to the date of the original complaint, as required by O.C.G.A. § 9-11-15(c), summary judgment in favor of the homebuilder was correctly granted, based on the expiration of the six-year limitation period under O.C.G.A. § 9-3-24. Wallick v. Lamb, 289 Ga. App. 25, 656 S.E.2d 164 (2007).

Docks. — Trial court did not err in failing to conclude that neighbors had established that a landowner's breach of contract claim was filed outside the applicable limitation period, O.C.G.A. § 9-3-24, because the landowner filed the landowner's complaint in 2010, and the trial court found, based on photographic evidence, that the landowner's cause of action accrued sometime in late 2006 or early 2007 when the neighbors moved their dock west of the location where the neighbor's dock was to be located pursuant to the site plan. Dillon v. Reid, 312 Ga. App. 34, 717 S.E.2d 542 (2011).

Six-year statute applied to implied promise to perform professionally. — Because an implied promise to perform professionally pursuant to a written agreement for professional services is written into a contract for professional services by the law, an alleged breach of this implied obligation is necessarily governed by the six-year contract statute of limitation of O.C.G.A. § 9-3-24, not the four-year statute applicable to professional malpractice actions under O.C.G.A. § 9-3-25. Saiia Constr., LLC v. Terracon Consultants, Inc., 310 Ga. App. 713, 714 S.E.2d 3 (2011).

9-3-25. Open accounts; breach of certain contracts; implied promise; exception.

Law reviews. — For survey article on construction law, see 60 Mercer L. Rev. 59 (2008). For annual survey of law on construction law, see 62 Mercer L. Rev. 71 (2010).

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Cited in Batesville Casket Co. v. Watkins Mortuary, Inc., 293 Ga. App. 854, 668 S.E.2d 476 (2008).

Actions, Generally

Preemption by statute of limitations contained in federal Interstate Commerce Act. — While the federal Interstate Commerce Act, 49 U.S.C. § 1 et seq., did not preempt a motor carrier's state law actions against a shipping broker for breach of contract and recovery on an open account, the state law statute of limitations for those actions found in O.C.G.A. §§ 9-3-25 and 46-9-5 were preempted by the 18-month statute of limitations in 49 U.S.C. § 14705(a); therefore, the carrier's action, filed five days after the 18-month time limit had expired, was untimely. Exel Transp. Servs. v. Sigma Vita, Inc., 288 Ga. App. 527, 654 S.E.2d 665 (2007).

Actions, Generally (Cont'd)

Service of process beyond statute of limitation period. — Trial court erred in granting a creditor summary judgment in its action against a guarantor to collect on a past due commercial account because the guarantor was served several years beyond either the two-year statute of limitation period, O.C.G.A. § 11-2-725, or the four-year limitation period, O.C.G.A. § 9-3-25; the creditor had notice of a service of process issue at least as early as March 2007 and knew of the service problem in January 2008, but it did not serve the guarantor with process until September 2008, and the creditor failed to prove that it exercised due diligence in attempting to effect service. Scanlan v. Tate Supply Co., 303 Ga. App. 9, 692 S.E.2d 684 (2010).

Motion to enforce lien for attorney's fees timely. — Trial court did not err in granting an attorney's motion to vacate the dismissal of a client's medical malpractice suit and to foreclose the attorney's lien for attorney fees under O.C.G.A. § 15-19-14(b) because the attorney's motion to enforce the lien was timely under the four-year statute of limitations applicable to open accounts, O.C.G.A. § 9-3-25, since the motion was filed within the same year the attorney's right of action accrued; the statute of limitation did not begin to run until the client settled the client's lawsuit on February 6, 2008, the attorney filed the attorney's notice of attorney's lien the day after the client executed the settlement release, and when the client filed a dismissal of the lawsuit without satisfying the lien the attorney filed the attorney's motion to vacate the dismissal and to enforce the attorney's lien on September 10, 2008. Woods v. Jones, 305 Ga. App. 349, 699 S.E.2d 567 (2010).

Allegations of engineering malpractice. — Because a recycler's breach of contract claim was premised on a written contract for professional services and called into question the conduct of an engineering firm in the firm's area of expertise, it was a claim for professional malpractice that was subject to the four-year statute of limitation in O.C.G.A. § 9-3-25, rather than the six-year statute of limitations applicable to actions on written contracts in O.C.G.A. § 9-3-24. Jordan Jones & Goulding, Inc. v. Newell Recycling of Atlanta, Inc., 299 Ga. App. 294, 682 S.E.2d 666 (2009).

Engineering firm was properly granted summary judgment in a breach of contract suit because the three documents the customer claimed to form the written contract did not contain the essential element of consideration; thus, the parties' agreement was not a contract in writing and the four-year limitation period under O.C.G.A. § 9-3-25 applied and the suit was time barred. Newell Recycling of Atlanta, Inc. v. Jordan Jones & Goulding, Inc., 317 Ga. App. 464, 731 S.E.2d 361 (2012).

Action to collect unpaid credit card debt not an action on open account. — Because an action filed by a creditor to collect unpaid credit card charges was based on a written contract, and not an open account, the trial court properly held that the six-year limitations period under O.C.G.A. § 9-3-24 applied (and not that under O.C.G.A. § 9-3-25), supporting summary judgment in the creditor's favor; moreover, because the transaction at issue was a written contract, the form of the debtor's acceptance was immaterial. Hill v. Am. Express, 289 Ga. App. 576, 657 S.E.2d 547 (2008), cert. denied, 2008 Ga. LEXIS 490 (Ga. 2008).

Applicability to agreement that was not a written contract. — Document and blueprints did not create a written contract under O.C.G.A. § 13-3-1 and thus the parties' construction agreement was an oral/parol one and the limitations period of O.C.G.A. § 9-3-25 applied; the documents could not be read together as the documents did not reference each other and were not contemporaneous, and moreover even if the documents could be read together, the documents did not identify the subject matter of the contract or the specific parties to the contract, and neither was signed, thus failing to reflect the parties' assent. Harris v. Baker, 287 Ga. App. 814, 652 S.E.2d 867 (2007).

Monthly wire transfer payments from a debtor to a creditor containing notations regarding the debtor's account constituted new promises by

the debtor to pay under O.C.G.A. §§ 9-3-110 and 9-3-112 and sufficed to renew the running of the four-year statute of limitations, O.C.G.A. § 9-3-25. Because the last payment was made in July 2008, the creditor's suit in March 2012 was not time-barred. SKC, Inc. v. eMag Solutions, LLC, 326 Ga. App. 798, 755 S.E.2d 298 (2014).

Running of Limitation

Controlling effect of time of breach. Former employer was entitled to summary judgment as to a former employee's breach of contract claim because the four-year statute of limitations barred the claim since the employee's right of action accrued either when the former employer's owner first agreed to give the employee 10% of the company or when the employee's compensation changed to only a base salary and the owner refused to give the employee a written document of any kind. Contract Furniture Refinishing & Maint. Corp. v. Remanufacturing & Design Group, LLC, 317 Ga. App. 47, 730 S.E.2d 708 (2012).

Creditor's nondischargeability complaint against the debtor failed as a matter of law because there was no enforceable debt to except from the debtor's bankruptcy discharge after the creditor failed to file a suit against the debtor within four years after the debtor missed the date agreed upon for repayment in the oral contract between the parties. Even if the contract was entered into fraudulently, the same limitations period applied, and the statute began to run from the date the fraud was discovered, which was also the date of initial default on repayment of the loan. Stinson v. Robinson (In re Robinson), 525 B.R. 822 (Bankr. N.D. Ga. 2015).

In action based on breach of oral agreement, etc.

Under Georgia law, contracts that are partly written and partly in parol must be considered as in parol and are governed by the four-year statute of limitation applicable to oral contracts under O.C.G.A. § 9-3-25. Bridge Capital Investors II v. Small, No. 04-14022, 2005 U.S. App. LEXIS 14182 (11th Cir. July 12, 2005) (Unpublished).

Fraud necessary to toll statute. Four-year statute of limitations applicable to accountant malpractice actions, O.C.G.A. § 9-3-25, was not tolled by fraud because there was no evidence that the accountant concealed or failed to disclose information that deterred the client from filing suit within the limitation period; the accountant consistently informed the client that the tax return was not complete. Bryant v. Golden, 302 Ga. App. 760, 691 S.E.2d 672 (2010).

Certain of plaintiff's claims for fraud, conversion, and breach of oral contract arose outside of the four-year statutes of limitation, and the undisputed facts showed that the plaintiff did not exercise reasonable diligence in discovering the defendant's alleged fraud as to a certain account as the defendant was put on notice of the account when the defendant received two personal checks issued from that account, endorsed and cashed the checks, but never inquired as to the checks' source. Hot Shot Kids Inc. v. Pervis (In re Pervis), 497 B.R. 612 (Bankr. N.D. Ga. 2013).

Accrual of action for attorney's negligence. — In a legal malpractice action, despite the fact that the trial court held that the client's failure to prove proximate causation supported an order granting summary judgment to the attorney and the attorney's law firm, the appeals court nevertheless held that summary judgment was properly granted to the attorney, under the "right for any reason" rule, as the suit was untimely filed. Moreover, the client's argument that the attorney could have amended the suit to add a damages claim up until the time of a pre-trial order, and that this later failure to act should be considered the triggering date for the malpractice action, was unavailing, as the attorney's failure to amend constituted a failure to avoid the effect of the earlier breach and a failure to mitigate damages, but was not a failure inflicting a new harm, thus triggering a new limitations period. Duke Galish, LLC v. Arnall Golden Gregory, LLP, 288 Ga. App. 75, 653 S.E.2d 791 (2007), cert. denied, 2008 Ga. LEXIS 212 (Ga. 2008).

Not applicable to engineering malpractice claim arising out of written contract. — Court of Appeals erred in

Running of Limitation (Cont'd)

holding that a professional malpractice claim premised on a written contract between an engineering firm and the firm's client was governed by the four-year statute of limitations in O.C.G.A. § 9-3-25, rather than the six-year statute of limitations in O.C.G.A. § 9-3-24. Newell Recycling of Atlanta, Inc. v. Jordan Jones & Goulding, Inc., 288 Ga. 236, 703 S.E.2d 323 (2010).

Six-year statute applied to implied promise to perform professionally. — Because an implied promise to perform professionally pursuant to a written agreement for professional services is written into a contract for professional services by the law, an alleged breach of this implied obligation is necessarily governed by the six-year contract statute of limitation of O.C.G.A. § 9-3-24, not the four-year statute applicable to professional malpractice actions under O.C.G.A. § 9-3-25. Saiia Constr., LLC v. Terracon Consultants, Inc., 310 Ga. App. 713, 714 S.E.2d 3 (2011).

Accrual of action for repayment of personal loan. — In a suit for repayment of a personal loan, the trial court did not err by denying the debtor's motion for a directed verdict based on the debtor's assertion that the statute of limitations set forth in O.C.G.A. § 9-3-25 had expired as the facts showed that the parties intended, either expressly or impliedly, that demand for repayment would not be made until some future time. Therefore, the statute of limitations did not commence to run until the date of demand for repayment. Murphy v. Varner, 292 Ga. App. 747, 666 S.E.2d 53 (2008).

No tolling due to fraud of mortgagee. — In response to certified questions from a federal action which arose with respect to a mortgagee's charges that included substantial notary fees from a refinancing transaction, it was determined that even if there was actual fraud by the mortgagee, there was no tolling of limitations periods for claims of fraud and money had and received pursuant to O.C.G.A. §§ 9-3-25 and 9-3-31, as the mortgagors could have discovered the impropriety of the notary fees by simple reference to O.C.G.A. § 45-17-11. Anthony v. Am. Gen. Fin. Servs., 287 Ga. 448, 697 S.E.2d 166 (2010).

In an action by borrowers claiming that the lender's charging of an illegal notary fee gave rise to a "money had and received" claim, the district court did not err in dismissing, on statute of limitations grounds, the claim, which was brought more than five years after the borrowers signed the loan agreement because, even assuming the lender's conduct constituted actual fraud, Georgia's Supreme Court, in response to a certified question, declined to allow equitable tolling because the borrowers could have discovered the discrepancy between the notary fee statute and the actual fee charged at any time by simple reference to the notary fee statute. Anthony v. Am. Gen. Fin. Servs., 626 F.3d 1318 (11th Cir. 2010).

Action time-barred in real estate firm's claims. — Trial court properly dismissed a real estate firm's counterclaims against a title insurance company as time barred because the firm did not bring the firm's counterclaims for complaint on account and money had and received until February 8, 2010, more than four years after the claims accrued; thus, those claims were brought outside the statute of limitation and the trial court properly granted summary judgment to the title insurance company on those claims. Dewrell Sacks, LLP v. Chicago Title Insurance Co., 324 Ga. App. 219, 749 S.E.2d 802 (2013).

9-3-26. Other actions on contracts; exception.

JUDICIAL DECISIONS

Contract action not time barred. — One-year statute of limitations in § 13 of the Securities Act, 15 U.S.C. § 77m, did not bar an equity receiver of an investment company from suing sales agents who participated in a billboard

sale-and-leaseback Ponzi scheme to force the agents to disgorge sales commissions and bonuses because the receiver did not sue under federal securities law but alleged only a state law claim for unjust enrichment/constructive trust, which fell under the four-year limitations period in O.C.G.A. § 9-3-26. Hays v. Adam, 512 F. Supp. 2d 1330 (N.D. Ga. Mar. 15, 2007).

9-3-27. Actions against fiduciaries.

JUDICIAL DECISIONS

ANALYSIS

RUNNING OF LIMITATION

Running of Limitation

Summary judgment improperly granted to siblings on statute of limitations bar issue. — Trial court erred in granting summary judgment to the siblings on the basis that the challenging sister's claim against the estate seeking an accounting was time-barred because a question of fact remained as to whether the sister was on notice that they had claimed any estate property adversely to the sister; thus, a jury had to decide whether the 10-year bar of O.C.G.A. § 9-3-27(2) began to run before that time. In re Estate of Wade, 331 Ga. App. 535, 771 S.E.2d 214 (2015).

9-3-28. Actions by informers.

JUDICIAL DECISIONS

Actions under Consolidated Omnibus Budget Reconciliation Act. — District court erred in ruling that a former employee's improper-notification claim was barred by the applicable statute of limitations, O.C.G.A. § 9-3-28, because the employee's suit was within the one-year limitations period when the suit was filed because a Consolidated Omnibus Budget Reconciliation Act improper-notice claim accrued when a plaintiff either knew or should have known the facts necessary to bring an improper-notice claim, and the employee's claim did not accrue until the employee learned from a lawyer that the employee should have received notice of the employee's continuation right from the former employer. Cummings v. Wash. Mut., 650 F.3d 1386 (11th Cir. 2011).

9-3-29. Breach of restrictive covenant.

JUDICIAL DECISIONS

Accrual of cause of action.

Suit alleging violation of a restrictive covenant was timely under O.C.G.A. § 9-3-29(a) because the suit accrued when a real estate developer failed to build a fence between abutting properties, as required by the covenant, and the suit was filed within two years of accruing. Lesser v. Doughtie, 300 Ga. App. 805, 686 S.E.2d 416 (2009).

Under the express language of O.C.G.A. § 9-3-29, the limitation period begins to run immediately upon a property owner's first use of the owner's property in violation of a restrictive covenant; thus, to the extent that Black Island Homeowners Assn. v. Marra, 263 Ga. App. 559 (2003) and Marino v. Clary Lakes Homeowners Assn., 322 Ga. App. 839 (2013) apply the continuing nuisance theory to determine when the statute of limitation begins to run under § 9-3-29, those cases are over-

ruled. S-D RIRA, LLC v. Outback Prop. Owners' Ass'n, 330 Ga. App. 442, 765 S.E.2d 498 (2014).

9-3-30. Trespass or damage to realty.

Law reviews. — For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010).

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Statute barred claim for electrical damage to office equipment. — Dissolved corporation's failure to obtain reinstatement prior to the expiration of the four-year statute of limitations for the corporation's causes of action arising out of electrical damage to the corporation's office equipment during a storm prevented the corporation from initiating a valid timely filed lawsuit. GC Quality Lubricants v. Doherty, Duggan, & Rouse Insurors, 304 Ga. App. 767, 697 S.E.2d 871 (2010).

Cited in Mize v. McGarity, 293 Ga. App. 714, 667 S.E.2d 695 (2008); Ashton Atlanta Residential, LLC v. Ajibola, 331 Ga. App. 231, 770 S.E.2d 311 (2015).

Transfer of Property

Section does not apply to action to cancel deed. — Trial court erred in applying the four-year statutes of limitation found in O.C.G.A. §§ 9-3-30 and 9-3-31 to enter summary judgment on the seller's action seeking to cancel a deed because Georgia law recognized an equitable seven-year limit on suits for cancellation of deeds. Serchion v. Capstone Partners, Inc., 298 Ga. App. 73, 679 S.E.2d 40 (2009), cert. denied, No. S09C1642, 2009 Ga. LEXIS 781 (Ga. 2009).

Trial court erred in granting family members summary judgment on the issue of the limitation period applicable to the children's claims for cancellation of fraudulent deeds because the court should not have applied the four-year statute of limitation for fraud, O.C.G.A. §§ 9-3-30 and 9-3-31; although the trial court ruled that no evidence of fraud prevented the children from timely filing their claim within the four-year statute of limitation for fraud, the court did not consider whether fraud prevented the children from timely filing within the applicable seven-year period. Evans v. Dunkley, 316 Ga. App. 204, 728 S.E.2d 832 (2012).

Construction

Claim based on construction contract.

Because the four-year statute of limitations in O.C.G.A. § 9-3-30(a) had expired, an insurer acting as subrogee of its insured, a general contractor, was precluded from pursuing a subrogation claim based on negligence against a subcontractor that had damaged a roadway while installing underground cables. Mass. Bay Ins. Co. v. Sunbelt Directional Drilling, Inc., No. 1:07-CV-0408-JOF, 2008 U.S. Dist. LEXIS 20066 (N.D. Ga. Feb. 14, 2008).

Suit barred by statute of limitations as suit was for breach of contract, not negligence. — Trial court properly granted summary judgment in a breach of contract claim to a construction company and one of the company's representatives as the suing homeowner had

brought suit in 2007, and the work on the interior of the home was substantially completed in 1999; thus, the suit was barred by the six year limitation period set forth in O.C.G.A. § 9-3-24. The suit did not sound in tort since the homeowner failed to allege any property damage and only sought repair/replacement damages. Wilks v. Overall Constr., Inc., 296 Ga. App. 410, 674 S.E.2d 320 (2009).

Other Examples

Inverse condemnation claim based on nuisance.

To the extent that the landowners asserted a claim for permanent nuisance based on the installation of a drain pipe more than four years prior to filing the claim, the landowners' claim was barred by the statute of limitations. Liberty County v. Eller, 327 Ga. App. 770, 761 S.E.2d 164 (2014).

Application to nuisance action. — Trial court erred by allowing a homeowner's nuisance claim against a county to survive summary judgment because that claim was barred by the four-year statute of limitations period set forth in O.C.G.A. § 9-3-30(a) as the homeowner did not file suit until eight years after the county performed the drain work complained of in the action that was purportedly causing the homeowner's property to flood. Floyd County v. Scott, 320 Ga. App. 549, 740 S.E.2d 277 (2013).

Nuisance action wherein railroad and city were alleged to have failed to maintain a culvert and drainage pipe that caused flood damage. — Appellate court erred by reversing summary judgment to a railroad and a city in the homeowners' nuisance and negligence suit against the entities as the homeowners' permanent nuisance claim was barred by the four year statute of limitations period set forth in O.C.G.A. § 9-3-30; the homeowners failed to show triable issues that the railroad improperly maintained the culvert and drainage pipe at issue; and the homeowners failed to show that the city had any duty to maintain the culvert and pipe since the homeowners failed to show that the city had taken any control over the property in question and, thus, became responsible for maintaining the culvert and pipe. City of Atlanta v. Kleber, 285 Ga. 413, 677 S.E.2d 134 (2009).

Nuisance alleged from energy plant noise and vibrations. — Denial of summary judgment to an energy facility owner and operator was proper in an action by neighboring property owners, alleging a nuisance from the noise and vibrations emanating from the facility, as an issue of fact existed as to whether there was an adverse change in the nature of the alleged nuisance within the limitations period of O.C.G.A. § 9-3-30(a). Oglethorpe Power Corp. v. Forrister, 289 Ga. 331, 711 S.E.2d 641 (2011).

Suit arising from power poles time barred. — Owner's action against a power company arising from power poles on the owner's property was time barred under O.C.G.A. § 9-3-30 because the owner bought the property after the poles were installed and the lines were operating, but failed to bring suit within four years of the purchase date; the suit was barred whether brought as a trespass claim or an inverse condemnation claim. Adams v. Ga. Power Co., 299 Ga. App. 399, 682 S.E.2d 650 (2009), cert. denied, No. S09C2018, 2010 Ga. LEXIS 14 (Ga. 2010).

9-3-31. Injuries to personalty.

Law reviews. — For article, "2013 Georgia Corporation and Business Organization Case Law Developments," see 19 Ga. St. B.J. 28 (April 2014).

JUDICIAL DECISIONS

Analysis

General Consideration

Section does not apply to action to cancel deed. — Trial court erred in applying four-year statutes of limitation found in O.C.G.A. §§ 9-3-30 and 9-3-31 to enter summary judgment on the seller's action seeking to cancel a deed because Georgia law recognized an equitable seven-year limit on suits for cancellation of deeds. Serchion v. Capstone Partners, Inc., 298 Ga. App. 73, 679 S.E.2d 40 (2009), cert. denied, No. S09C1642, 2009 Ga. LEXIS 781 (Ga. 2009).

No tolling due to fraud. — In response to certified questions from a federal action which arose with respect to a mortgagee's charges that included substantial notary fees from a refinancing transaction, it was determined that even if there was actual fraud by the mortgagee, there was no tolling of limitation periods for claims of fraud and money had and received pursuant to O.C.G.A. §§ 9-3-25 and 9-3-31 as the mortgagors could have discovered the impropriety of the notary fees by simple reference to O.C.G.A. § 45-17-11. Anthony v. Am. Gen. Fin. Servs., 287 Ga. 448, 697 S.E.2d 166 (2010).

Fact issues on peanut and tobacco quotas. — In a dispute involving a family farm partnership, the trial court erred by granting summary judgment to the children/grandchildren as to the claim regarding the peanut and tobacco quotas and assignments where certain claims were not untimely because genuine issues of fact existed as to whether a son inappropriately used a power of attorney as to the quotas and assignments and the father/grandfather sought to recover damage to personalty. Godwin v. Mizpah Farms, LLLP, 330 Ga. App. 31, 766 S.E.2d 497 (2014).

Claim not waived on appeal. — Appellants were entitled to urge on appeal that appellees failed to show that certain legal bills fell outside the limitation period of O.C.G.A. § 9-3-31, even if they did not raise that specific factual argument in the trial court; the statute of limitations was an affirmative defense, and so the burden was on appellees to come forward with evidence sufficient to make out a prima facie case that appellants' billing claim fell outside the limitation period. Falanga v. Kirschner & Venker, P.C., 286 Ga. App. 92, 648 S.E.2d 690 (2007).

Cited in Hook v. Bergen, 286 Ga. App. 258, 649 S.E.2d 313 (2007); Cochran Mill Assocs. v. Stephens, 286 Ga. App. 241, 648 S.E.2d 764 (2007); McKesson Corp. v. Green, 299 Ga. App. 91, 683 S.E.2d 336 (2009).

Injuries to Personalty

Fraud in pool construction not shown. — Homeowner's claims against a contractor for breach of contract, breach of warranty, and fraud, brought more than six years after construction of a swimming pool was complete, were barred by the applicable statutes of limitations. Another contractor's affidavit that the contractor's statements to the owner regarding the structural integrity of the pool were false was insufficient to prove fraud by the contractor. Smith v. Hilltop Pools & Spas, Inc., 306 Ga. App. 881, 703 S.E.2d 424 (2010).

Running of Limitations

Act constituting legal injury to plaintiff.

When chapter 13 debtors failed to schedule the debtors' claim against the defendant credit union as an asset, and failed to bring the claim within four years after the triggering event, the death of debtor wife's former husband, as required by O.C.G.A. §§ 9-3-31 and 9-3-32, summary judgment on judicial estoppel and limitations grounds was proper. Kirton v. Fort Stewart Federal Credit Union (In re Carroll), No. 99-20813, 2001 Bankr. LEXIS 2317 (Bankr. S.D. Ga. June 26, 2001).

Limited partners' claims for breach of fiduciary duty. — Claims by limited partners in a real estate investment limited partnership that the general partners had breached their fiduciary duty by making material misrepresentations and omissions about net sales proceeds for 13 years were time-barred under O.C.G.A. § 9-3-31; the first communication was in 1987, and the action had been brought more than four years after that date, and the limitation period was not tolled under

O.C.G.A. § 9-3-96 because the limited partners had been on notice of the true contents of the partnership agreement the entire time and thus had always had proper notice of the information necessary to determine the truth. Hendry v. Wells, 286 Ga. App. 774, 650 S.E.2d 338 (2007), cert. denied, 2008 Ga. LEXIS 102 (Ga. 2008).

Accrual of actions.

Because a plaintiff alleged that the defendant, an investment advisory company, committed a breach of fiduciary duty by collecting management fees for certain stock after the stock was categorized as an unmanaged asset, and the categorization occurred some time between March 31, 2001, and June 20, 2001, the plaintiff's claim accrued within four years of the date of the filing of the complaint and was therefore timely; regardless of whether a four-year or a six-year statute of limitation period was applied, the trial court erred by granting summary judgment as to that particular claim on the ground that the claim was time-barred. Hamburger v. PFM Capital Mgmt., 286 Ga. App. 382, 649 S.E.2d 779 (2007).

Cause of action for breach of fiduciary duty accrues each time the defendant commits a wrongful act that causes appreciable damage. Hamburger v. PFM Capital Mgmt., 286 Ga. App. 382, 649 S.E.2d 779 (2007).

Plaintiff borrower's fraud claims against defendant lenders, in connection with an alleged long-term tax-favorable loan failed under O.C.G.A. § 9-3-31's four year statute of limitations (S/L) because the limitations period began when the assumption agreement was signed but the suit was not filed until almost 6 years later, and, at the very latest, if O.C.G.A. § 9-3-96 applied to toll the limitations period, the S/L began to run nearly five years earlier when repayment was demanded only one year after the loan was made. Curtis Inv. Co., LLC v. Bayerische Hypo-Und Vereinsbank, AG, No. 08-14401, 2009 U.S. App. LEXIS 17469 (11th Cir. Aug. 5, 2009).

Creditor's nondischargeability complaint against a debtor failed as a matter of law where there was no enforceable debt to except from the debtor's bankruptcy discharge because the creditor failed to file a suit against the debtor within four years after the debtor missed the date agreed upon for repayment in the oral contract between the parties. Even if the contract was entered into fraudulently, the same limitations period applied, and the statute began to run from the date the fraud was discovered, which was also the date of initial default on repayment of the loan. Stinson v. Robinson (In re Robinson), 525 B.R. 822 (Bankr. N.D. Ga. 2015).

Due diligence to discover fraud.

In an action by borrowers claiming that the lender defrauded the borrowers by charging an excessive notary fee, the district court did not err in dismissing, on statute of limitations grounds, the fraud claim, which was brought more than five years after the borrowers signed the loan agreement because, even assuming the lender's conduct constituted actual fraud, Georgia's Supreme Court, in response to a certified question, declined to allow equitable tolling because the borrowers could have discovered the discrepancy between the notary fee statute and the actual fee charged at any time by simple reference to the notary fee statute. Anthony v. Am. Gen. Fin. Servs., 626 F.3d 1318 (11th Cir. 2010).

Townhome buyers' fraud and Interstate Land Sales Full Disclosure Act (ILSA) claims against a seller were barred by the four-year statute of limitations for fraud, O.C.G.A. § 9-3-31, and the three-year statute of limitations for ILSA violations, 15 U.S.C. § 1711; the buyers were on notice when the closing did not take place in 2003, and certainly when the closing did not occur by 2006, that something was wrong and should have discovered any alleged violations of ILSA. Allmond v. Young, 314 Ga. App. 230, 723 S.E.2d 691 (2012).

Certain of plaintiff's claims for fraud, conversion, and breach of oral contract arose outside of the four-year statute of limitation, and the undisputed facts showed that the plaintiff did not exercise reasonable diligence in discovering the defendant's alleged fraud as to a certain account as the defendant was put on notice of the account when the defendant

Running of Limitations (Cont'd)

received two personal checks issued from that account, endorsed and cashed the checks, but never inquired as the checks' source. Hot Shot Kids Inc. v. Pervis (In re Pervis), 497 B.R. 612 (Bankr. N.D. Ga. 2013).

Court did not err in dismissing the tax advisor's claims as time-barred because the advisor filed the complaint long after the limitations periods governing the fraud, breach of fiduciary duty, and Georgia RICO claims had expired, and the advisor had not plausibly alleged that the advisor exercised reasonable diligence in discovering the causes of action and thus could not have invoked tolling where the advisor received direct information that conflicted with the bank entities' representation that the tax shelter transactions at issue had economic substance, the advisor did not explain how the advisor exercised reasonable diligence in light of that notice, and the advisor did not explain why the advisor could not have sued earlier. Klopfenstein v. Deutsche Bank Sec., Inc., No. 14-12611, 2014 U.S. App. LEXIS 22077 (11th Cir. Nov. 20, 2014) (Unpublished).

Tolling due to fraud. — In a negligent misrepresentation case wherein a trustee obtained a $10 million verdict against an accounting firm, the evidence authorized the jury to find that the firm's fraud prevented the trustees from discovering the trusts' cause of action until January 2002, despite reasonable diligence and, therefore, the claim was properly filed within four years after the beginning of the limitation period. PricewaterhouseCoopers, LLP v. Bassett, 293 Ga. App. 274, 666 S.E.2d 721 (2008).

Accrual of cause for fraudulent inducement to contract.

Since the individual's fraud in the inducement claim against a corporation was time-barred pursuant to O.C.G.A. § 9-3-31, the district court's grant of summary judgment in favor of the corporation was affirmed. Bridge Capital Investors II v. Small, No. 04-14022, 2005 U.S. App. LEXIS 14182 (11th Cir. July 12, 2005) (Unpublished).

Tolling due to bankruptcy filing. — Debtor's claim for property damages resulting from a wrongful foreclosure was not time barred because the debtor filed for bankruptcy protection within four years of the date of the foreclosure and the filing of the bankruptcy petition tolled the statute of limitations. McDaniel v. SunTrust Bank (In re McDaniel), 523 B.R. 895 (Bankr. M.D. Ga. 2014).

9-3-32. Accrual of actions for recovery of personal property or loss of timber; damages for conversion or destruction.

Actions for the recovery of personal property, or for damages for the conversion or destruction of the same, shall be brought within four years after the right of action accrues, and actions involving the unauthorized cutting or cutting and carrying away of timber from the property of another shall be brought within four years after the cutting or cutting and carrying away of timber. (Ga. L. 1855-56, p. 233, § 2; Code 1933, § 3-1003; Ga. L. 2014, p. 695, § 1/HB 790.)

The 2014 amendment, effective July 1, 2014, added ", and actions involving the unauthorized cutting or cutting and carrying away of timber from the property of another shall be brought within four years after the cutting or cutting and carrying away of timber" at the end of this Code section.

Cross references. — Tort action for third party timber harvester, § 51-11-10.

JUDICIAL DECISIONS

Recovery or damages for conversion of distributed property.

When chapter 13 debtors failed to schedule the debtors' claim against the defendant credit union as an asset, and failed to bring the claim within four years after the triggering event, the death of debtor wife's former husband, as required by O.C.G.A. §§ 9-3-31 and 9-3-32, summary judgment on judicial estoppel and limitations grounds was proper. Kirton v. Fort Stewart Federal Credit Union (In re Carroll), No. 99-20813, 2001 Bankr. LEXIS 2317 (Bankr. S.D. Ga. June 26, 2001).

Accrual of action for fraudulent conveyance. — In determining when a cause of action accrued for purposes of O.C.G.A. § 9-3-32 it was necessary to ascertain the time when the plaintiff could first have maintained the plaintiff's action to a successful result. The relevant date for determining the statute of limitations on a fraudulent conveyance claim, pursuant to O.C.G.A. §§ 18-2-74, 18-2-75, and 18-2-76, was the date that the debtor incurred the obligation to make the transfer. Kipperman v. Onex Corp., 411 B.R. 805 (N.D. Ga. 2009).

Accrual of action for selling goods. — When a recycler of shipping pallets retained pallets under a colorable claim of naked depository status but sold certain of the pallets, the claim of the putative owner of the pallets for conversion with regard to the sold pallets accrued when the pallets were sold rather than when the recycler obtained the pallets. CHEP USA v. Mock Pallet Co., 2005 U.S. App. LEXIS 12604 (11th Cir. June 24, 2005) (Unpublished).

Accrual of conversion and misappropriation claims. — District court did not err in concluding that the four-year statute of limitations on the plaintiffs' conversion and misappropriation claims, under O.C.G.A. § 9-3-32, began to run no later than December 30, 2005, and that those claims were time-barred because the plaintiffs' demand that all of the plaintiffs' share of the proceeds from the sale be distributed to the plaintiffs, rather than be credited to other debts, was refused in a December 30, 2005, letter and the defendants paid the plaintiffs less than the distribution to which the plaintiffs felt the plaintiffs were entitled. HealthPrime, Inc. v. Smith/Packett/Med/Com, LLC, No. 11-10028, 2011 U.S. App. LEXIS 11324 (11th Cir. June 3, 2011) (Unpublished).

Certain of the plaintiff's claims for fraud, conversion, and breach of oral contract arose outside of the four-year statute of limitation, and the undisputed facts showed that the plaintiff did not exercise reasonable diligence in discovering the defendant's alleged fraud as to a certain account as the defendant was put on notice of the account when the defendant received two personal checks issued from that account, endorsed and cashed the checks, but never inquired as to the checks' source. Hot Shot Kids Inc. v. Pervis (In re Pervis), 497 B.R. 612 (Bankr. N.D. Ga. 2013).

Trial court properly granted a tobacco cooperative summary judgment on the tobacco farmers' claim for conversion because any conversion of a farmer's pro-rata share of net gains for crop years 1967 through 1973 occurred in 1975, when the tobacco cooperative set aside the undistributed net gain into its capital reserve, thus, the suit filed in 2007 was time-barred. Rigby v. Flue-Cured Tobacco Coop. Stabilization Corp., 327 Ga. App. 29, 755 S.E.2d 915 (2014).

9-3-33. Injuries to the person; injuries to reputation; loss of consortium; exception.

Except as otherwise provided in this article, actions for injuries to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year after the right of action accrues, and except for actions

for injuries to the person involving loss of consortium, which shall be brought within four years after the right of action accrues. (Laws 1767, Cobb's 1851 Digest, p. 562; Laws 1805, Cobb's 1851 Digest, p. 564; Ga. L. 1855-56, p. 233, § 5; Code 1863, § 2992; Code 1868, § 3005; Code 1873, § 3060; Code 1882, § 3060; Civil Code 1895, § 3900; Civil Code 1910, § 4497; Code 1933, § 3-1004; Ga. L. 1964, p. 763, § 1; Ga. L. 2015, p. 675, § 2-1/SB 8.)

The 2015 amendment, effective July 1, 2015, substituted "Except as otherwise provided in this article, actions" for "Actions" at the beginning of this Code section.

Editor's notes. — Ga. L. 2015, p. 675, § 1-1/SB 8, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Safe Harbor/Rachel's Law Act.'"

Ga. L. 2015, p. 675, § 1-2/SB 8, not codified by the General Assembly, provides: "(a) The General Assembly finds that arresting, prosecuting, and incarcerating victimized children serves to retraumatize children and increases their feelings of low self-esteem, making the process of recovery more difficult. The General Assembly acknowledges that both federal and state laws recognize that sexually exploited children are the victims of crime and should be treated as victims. The General Assembly finds that sexually exploited children deserve the protection of child welfare services, including family support, crisis intervention, counseling, and emergency housing services. The General Assembly finds that it is necessary and appropriate to adopt uniform and reasonable assessments and regulations to help address the deleterious secondary effects, including but not limited to, prostitution and sexual exploitation of children, associated with adult entertainment establishments that allow the sale, possession, or consumption of alcohol on premises and that provide to their patrons performances and interaction involving various forms of nudity. The General Assembly finds that a correlation exists between adult live entertainment establishments and the sexual exploitation of children. The General Assembly finds that adult live entertainment establishments present a point of access for children to come into contact with individuals seeking to sexually exploit children. The General Assembly further finds that individuals seeking to exploit children utilize adult live entertainment establishments as a means of locating children for the purpose of sexual exploitation. The General Assembly acknowledges that many local governments in this state and in other states found deleterious secondary effects of adult entertainment establishments are exacerbated by the sale, possession, or consumption of alcohol in such establishments.

"(b) The purpose of this Act is to protect a child from further victimization after he or she is discovered to be a sexually exploited child by ensuring that a child protective response is in place in this state. The purpose and intended effect of this Act in imposing assessments and regulations on adult entertainment establishments is not to impose a restriction on the content or reasonable access to any materials or performances protected by the First Amendment of the United States Constitution or Article I, Section I, Paragraph V of the Constitution of this state."

Law reviews. — For survey article on product liability law, see 59 Mercer L. Rev. 331 (2007). For survey article on local government law, see 60 Mercer L. Rev. 263 (2008). For annual survey on product liability, see 61 Mercer L. Rev. 267 (2009).

For note, "Taking a Toll on the Equities: Governing the Effect of the PLRA'S Exhaustion Requirements on State Statutes of Limitations," 47 Ga. L. Rev. 1321 (2013).

For comment, "Accrual and Unusual? Calibrating the Statute of Limitations on Section 1983 Method-of-Execution Challenges," see 62 Emory L.J. 407 (2012).

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Injury to property. — Insurer's negligence claim was timely because it sought recovery for damages to its property, and thus, the claim was governed by the four year limitations period of O.C.G.A. § 9-3-33, rather than by a two year limitations period. Arch Ins. Co. v. Bennett, No. 2:08-CV-0075-RWS, 2009 U.S. Dist. LEXIS 118321 (N.D. Ga. Dec. 21, 2009).

Claims under 29 U.S.C. § 701, 42 U.S.C. § 12131.

In a case in which the district court dismissed a tenant's claims under the Americans with Disabilities Act (ADA) and the Rehabilitation Act as time-barred based on the two-year statute of limitations in O.C.G.A. § 9-3-33, the tenant conceded that the complaint was filed more than two years after the last act of discrimination and unsuccessfully argued that the complaint was timely because the tenant was entitled to statutory tolling under the Fair Housing Act (FHA). Although the FHA contained a statutory tolling provision, the tenant cited no authority for the contention that the FHA extended to claims raised under the ADA or the Rehabilitation Act. Hunt v. Ga. Dep't of Cmty. Affairs, No. 12-10935, 2012 U.S. App. LEXIS 19535 (11th Cir. Sept. 18, 2012) (Unpublished).

Application to 42 U.S.C. § 1985 claims. — In an employment discrimination case that alleged, inter alia, violations of 42 U.S.C. §§ 1983 and 1985, a district court's dismissal was affirmed because the complaint was not filed within the two-year limitations period established for such claims under O.C.G.A. § 9-3-33. Roberts v. Georgia, No. 06-14137, 2007 U.S. App. LEXIS 8005 (11th Cir. Apr. 6, 2007) (Unpublished).

Claims under 42 U.S.C. § 1981. — Employee's race discrimination claims against an employer under 42 U.S.C. § 1981, based on a failure to promote, were barred by the applicable two-year limitations period of O.C.G.A. § 9-3-33. Saunders v. Emory Healthcare, Inc., No. 09-10283; No. 09-11530, 2010 U.S. App. LEXIS 615 (11th Cir. Jan. 11, 2010), cert. denied, U.S. , 131 S. Ct. 1473, 179 L. Ed. 2d 300 (2011) (Unpublished).

Claims under 42 U.S.C. § 1983. — There was no error in dismissing the petitioner's civil rights complaint without prejudice and the petitioner's subsequent motion to reconsider because the petitioner did not identify any legal standards or procedures the judge improperly applied, manifest errors in fact-finding by the judge, or newly discovered evidence; 42 U.S.C. § 1983 claims were subject to the statute of limitations governing personal injury actions in the state where the Section 1983 action was brought. McFarlin v. Douglas County, No. 13-15115, 2014 U.S. App. LEXIS 18700 (11th Cir. Sept. 30, 2014) (Unpublished).

Actions barred.

Because the alleged incident in a hospital occurred nearly five years before the complaint was filed, the claims involving a hospital incident were time-barred under O.C.G.A. § 9-3-33; thus, the district court did not abuse the court's discretion in dismissing the action against the state and several of the state's officials. Simon v. Georgia, No. 07-14208, 2008 U.S. App. LEXIS 13048 (11th Cir. June 16, 2008) (Unpublished).

Resident's third automobile personal injury lawsuit against a former resident was properly dismissed because service of the resident's second lawsuit was not perfected in accordance with the Georgia Long-Arm Statute, O.C.G.A. § 9-10-91, and the period of limitations in O.C.G.A. § 9-3-33 ran before the third lawsuit (allegedly as a renewal of the second lawsuit

General Consideration (Cont'd)

under O.C.G.A. § 9-2-61) was filed. Coles v. Reese, 316 Ga. App. 545, 730 S.E.2d 33 (2012).

Trial court should have dismissed an employee's tort claims against a supervisor because an arbitration between them and their employer was not a proceeding that could be renewed under O.C.G.A. § 9-2-61(a), and the claims were untimely under O.C.G.A. § 9-3-33 since the claims were not filed within six months of the dismissal or discontinuation of the employee's earlier federal action. Green v. Flanagan, 317 Ga. App. 152, 730 S.E.2d 161 (2012).

Many of the actions cited by an employee as supporting the employee's intentional infliction of emotional distress claims related to failure to promote the employee were barred by Georgia's two-year statute of limitations at O.C.G.A. § 9-3-33; the statute's four-year period related to consortium claims. Scott v. Rite Aid of Ga., Inc., No. (HL), 2013 U.S. Dist. LEXIS 7606 (M.D. Ga. Jan. 18, 2013).

Conclusion that the personal injury claimant was guilty of laches was upheld based on a finding that the claimant first attempted to serve the opposing party five days before the expiration of the two-year statute of limitations for personal injury actions, the opposing party was not served until a month after the initial attempt, and the claimant failed to explain how the claimant determined the opposing party's last address. Walker v. Culpepper, 321 Ga. App. 629, 742 S.E.2d 144 (2013).

Application to mandamus claim. — After federal claims were dismissed in a former employee's action against a county employer, the employee's mandamus claims against a county official for reinstatement were not straightforward so as to allow the court to accept jurisdiction of state claims under 28 U.S.C. § 1367 because it was unclear whether ante litem notice was required under O.C.G.A. § 36-11-1 and whether a one-year limitations of O.C.G.A. § 9-3-33 applied to the mandamus claim. Toma v. Columbia County, No. CV 106-145, 2007 U.S. Dist. LEXIS 30096 (S.D. Ga. Apr. 20, 2007).

Application to 42 U.S.C. § 1983 claims.

In an employment discrimination case in which a former employee's initial complaint was dismissed without prejudice because the former employee had not effected service within 120 days, a district court's dismissal of the former employee's 42 U.S.C. §§ 1983 and 1985 claims in a second complaint was affirmed because the claims were not timely under O.C.G.A. § 9-3-33, the Georgia statute borrowed for 42 U.S.C. §§ 1983 and 1985 claims. Since the former employee's initial complaint had been dismissed by court order granting the defendants' motions, the former employee's initial suit was void and incapable of renewal under O.C.G.A. § 9-2-61. Miller v. Georgia, No. 06-14138, 2007 U.S. App. LEXIS 6218 (11th Cir. Mar. 15, 2007) (Unpublished).

In a 42 U.S.C. § 1983 case in which a death row inmate challenged Georgia's three-drug lethal injection method, the complaint was untimely; the complaint was governed by the two-year statute of limitations found in O.C.G.A. § 9-3-33, and the inmate's claim accrued in 2001 when the General Assembly adopted lethal injection as Georgia's method of execution for death sentences as found in O.C.G.A. § 17-10-38. Alderman v. Donald, No. 08-12550, 2008 U.S. App. LEXIS 19072 (11th Cir. Sept. 3, 2008) (Unpublished).

Detainee's 42 U.S.C. § 1983 claims against six unnamed deputies were dismissed under Fed. R. Civ. P. 4(n) when more than two years after bringing suit and more than four years after her alleged injury occurred, the detainee failed to substitute named parties as defendants, and thus, the two-year limitations period in O.C.G.A. § 9-3-33 for 42 U.S.C. § 1983 claims expired. Williams v. Barrett, No. 08-11042, 2008 U.S. App. LEXIS 15329 (11th Cir. July 17, 2008) (Unpublished).

Appeal from denial of a prisoner's 42 U.S.C. § 1983 claim alleging Eighth Amendment violations was frivolous because all of the prisoner's claims were barred by the two-year statute of limitations set forth in O.C.G.A. § 9-3-33. Kellat v. Douglas County, No. 10-15713-D, 2011 U.S. App. LEXIS 26442 (11th Cir. Apr. 7, 2011).

In a 42 U.S.C. § 1983 case in which a pro se inmate appealed a district court's adverse ruling on the inmate's deliberate indifference claim, that claim was untimely under O.C.G.A. § 9-3-33 and the inmate did not meet the standard in O.C.G.A. § 9-3-90(a) to toll the limitations period. Though the inmate undoubtedly had mental problems both before and after the assault in prison, under medication the inmate was able to manage the ordinary affairs of the inmate's life. Thompson v. Corr. Corp. of Am., No. 12-10421, 2012 U.S. App. LEXIS 12274 (11th Cir. June 18, 2012) (Unpublished).

Cited in In re Carter, 288 Ga. App. 276, 653 S.E.2d 860 (2007); Chisolm v. Tippens, 289 Ga. App. 757, 658 S.E.2d 147 (2008); Doss v. City of Savannah, 290 Ga. App. 670, 660 S.E.2d 457 (2008); Akuoko v. Martin, 298 Ga. App. 364, 680 S.E.2d 471 (2009); Rosenberg v. Falling Water, Inc., 302 Ga. App. 78, 690 S.E.2d 183 (2009), aff'd, No. S10G0877, 2011 Ga. LEXIS 249 (Ga. 2011); Robinson v. Boyd, 288 Ga. 53, 701 S.E.2d 165 (2010); Williams v. Cobb County Farm Bureau, Inc., 312 Ga. App. 350, 718 S.E.2d 540 (2011); Gottschalk v. Woods, 329 Ga. App. 730, 766 S.E.2d 130 (2014).

Injuries to Person

Claims barred by statute of limitation. — Trial court did not err in granting a county and a police officer summary judgment on the arrestees' complaint for false arrest, false imprisonment, negligent hiring and retention, assault and battery, and intentional infliction of emotional distress because the arrestees' claims, which accrued on the date of the incident, were barred by the statute of limitation, O.C.G.A. § 9-3-33; the incident giving rise to the arrestees' complaint occurred on October 24, 2004, the jury returned not guilty verdicts on the obstruction charges on September 27, 2006, the trial court directed a verdict of acquittal the next day, and the arrestees filed their complaint on August 31, 2007. Valades v. Uslu, 301 Ga. App. 885, 689 S.E.2d 338 (2009), cert. denied, No. S10C0803, 2010 Ga. LEXIS 519 (Ga. 2010).

Medical malpractice. — In a wrongful death suit, a medical center was properly granted partial summary judgment as to an administrator's claims of nursing malpractice since the amended complaint alleged the claims were not filed within the two-year statute of limitation period set forth in O.C.G.A. § 9-3-33. Thomas v. Medical Ctr., 286 Ga. App. 147, 648 S.E.2d 409 (2007), cert. denied, 2007 Ga. LEXIS 699 (Ga. 2007).

Intentional termination of life support a wrongful death claim, not a malpractice claim. — Trial court properly refused to dismiss a plaintiff's claim asserting tortious termination of life support based on the defendant's argument that it was really a medical malpractice claim and, therefore, required an expert medical affidavit under O.C.G.A. § 9-11-9.1; because such a claim is a suit for wrongful death, not medical malpractice, no expert medical affidavit was necessary. DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823 (2007), cert. denied, 2008 Ga. LEXIS 477 (Ga. 2008).

Because the four-year time limit does not apply to loss of consortium claims arising out of medical malpractice, and the plaintiffs only have two years in which to file the plaintiffs' claims for loss of consortium arising out of medical malpractice, the spouse's loss of consortium claim was time barred as the claim was filed more than two years after the patient's injury. Beamon v. Mahadevan, 329 Ga. App. 685, 766 S.E.2d 98 (2014).

Dental malpractice. — Trial court erred by granting a dentist summary judgment in a dental malpractice suit as being filed outside the two-year limitations period because the court erred by ruling that the patient's consultation with an oral surgeon working with the dentist ended the tolling caused by the dentist's fraudulent concealment of the cause of action. MacDowell v. Gallant, 323 Ga. App. 61, 744 S.E.2d 836 (2013).

No criminal action against retailer since employee committed criminal acts over two years ago. — Trial court properly concluded that the tolling provision of O.C.G.A. § 9-3-99 did not apply to an employee's personal injury claims

Injuries to Person (Cont'd)

against a retailer because the retailer was not accused of any crime of which the employee was a victim, rather, a co-worker was indicted; therefore, the action against the retailer was barred by the two-year statute of limitation under O.C.G.A. § 9-3-33. Mays v. Target Corp., 322 Ga. App. 44, 743 S.E.2d 603 (2013).

Injuries to Reputation

Actions for injuries to reputation must be brought within one year, etc.

Trial court did not err in entering judgment in favor of a company on a debtor's libel claim because the debtor's claim was untimely under O.C.G.A. § 9-3-33; the debtor's libel claim was based upon the company's allegations in a deficiency claim against the debtor, which was filed in January 2007, and the company's subsequent failure to dismiss the claim after the debt was discharged in bankruptcy in March 2008, and the debtor first asserted the claim in September 2009. Sevostiyanova v. Tempest Recovery Servs., 307 Ga. App. 868, 705 S.E.2d 878 (2011).

Claims for slander, libel, etc.

One asphalt testing company was entitled to summary judgment as to a defamation claim because the claim was barred by the limitations period of O.C.G.A. § 9-3-33 and the characterization of the claim as one for "injurious falsehood" was not a viable claim in that plaintiffs failed to plead special damages. Douglas Asphalt Co. v. Qore, Inc., No. CV206-229, 2009 U.S. Dist. LEXIS 11002 (S.D. Ga. Feb. 13, 2009).

Claim for defamation barred. — Former employee's defamation claim was barred by the statute of limitations because the claim was filed more than one year after the challenged action occurred. Garcia v. Shaw Indus., Inc., 321 Ga. App. 48, 741 S.E.2d 285 (2013).

Claim for Damage to Reputation Barred.

Debtor's claim for reputation damages resulting from a wrongful foreclosure was time barred because the claim was brought more than one year after the date of the foreclosure and, even if an allegedly evasive answer by the lender's counsel was enough to warrant an equitable tolling, it was not enough to resurrect a limitations period that had already run. McDaniel v. SunTrust Bank (In re McDaniel), 523 B.R. 895 (Bankr. M.D. Ga. 2014).

Running of Limitations

Section runs from accrual of right of action.

In an inmate's 42 U.S.C. § 1983 suit asserting violations of the inmate's U.S. Const., amend. 1 rights due to the withholding of some of the inmate's mail, the prison employees, on the basis of the two-year limitations period in O.C.G.A. § 9-3-33, were entitled to summary judgment as to those claims that were based on incidents that occurred more than two years before the inmate filed suit; the prison employees' content-based denial of publications that were sent to the inmate constituted discrete acts that triggered the limitations period at the time each act occurred, rather than constituting a continuing violation. Daker v. Ferrero, 506 F. Supp. 2d 1295 (N.D. Ga. 2007).

Content-based denial of a publication to an inmate and the failure to provide an adequate post-denial procedure are both discrete acts that trigger the two-year limitations period in O.C.G.A. § 9-3-33 with regard to the inmate's 42 U.S.C. § 1983 claims. Daker v. Ferrero, 506 F. Supp. 2d 1295 (N.D. Ga. 2007).

All of a former public employee's 42 U.S.C. § 1983 federal claims were barred by the two-year statute of limitations, under O.C.G.A. § 9-3-33 because: (1) to the extent that the employee raised a substantive due process claim based on a property interest in continued employment with the employer, the employee knew of all of the relevant facts as to that claim when the employee resigned on March 5, 2007; (2) as to the employee's claims that the employee's reputation was damaged in violation of the employee's due process rights and that the employee was entitled to a name clearing hearing, the employee was aware of all of the relevant facts, at the latest, on January

25, 2008, by which time the employee knew of the termination letter and disciplinary action recommendation form; (3) the employee's argument that the employee was unaware that the employee was actually terminated until 2009 was without merit because the employee resigned in lieu of termination; and (4) the employee's constructive discharge claim was untimely because the employee was aware of the circumstances surrounding the employee's resignation as of March 5, 2007, the date that the employee resigned. Bell v. Metro. Atlanta RTA, No. 12-15371, 2013 U.S. App. LEXIS 11584 (11th Cir. June 7, 2013) (Unpublished).

Notice to a municipality. — Trial court erred by dismissing an arrestee's suit against a city alleging false arrest and other claims as being time-barred for not being filed within the two-year limitation period established in O.C.G.A. § 9-3-33, because the arrestee established that the arrestee had provided a timely ante litem notice, pursuant to O.C.G.A. § 36-33-5(b), to the city and had properly included evidence of the notice in the record as an exhibit to the appellate brief. Simon v. City of Atlanta, 287 Ga. App. 119, 650 S.E.2d 783 (2007).

Running of period in tort claim.

In a personal injury suit arising from the slip and fall by the injured party, because the trial court dismissed the injured party's first action as void for failure to perfect service, the second action could not amount to a renewal action under O.C.G.A. § 9-2-61(a); further, given that the second complaint disclosed on its face that the action was time-barred, it was correctly dismissed pursuant to O.C.G.A. § 9-3-33. Baxley v. Baldwin, 287 Ga. App. 245, 651 S.E.2d 172 (2007).

Because the plaintiff father's claims for false arrest, false imprisonment, and malicious prosecution against the defendants, his ex-wife and her new husband, were filed nearly 20 years after the arrest, those claims were time-barred under O.C.G.A. § 9-3-33 since there was no explanation of why the claims could not have been brought sooner. Brown v. Lewis, No. 09-13257, 2010 U.S. App. LEXIS 744 (11th Cir. Jan. 12, 2010), cert. denied, No. 09-1394, 2010 U.S. LEXIS 5442 (U.S. 2010) (Unpublished).

In this product liability action, genuine issues of material fact existed as to when several plaintiffs' product liability claims accrued since: (1) there was evidence that one plaintiff did not suspect that the plaintiff's suburethral sling might be defective until the summer of 2007, when the plaintiff's husband read an article about product liability lawsuits regarding the defendant; and (2) a reasonable fact finder could conclude that a second plaintiff did not suspect that the sling might be defective until after the January 2007 excision, when a doctor found an infection in the mesh and the doctor's physician assistant told the plaintiff that there was a problem with the sling. In re Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig., No. MDL 2004; No. 4:08-MD-2004 (CDL); No. 3:07-cv-00088; No. 3:07-cv-00101; No. 3:07-cv-00102; No. 3:07-cv-00130, 2010 U.S. Dist. LEXIS 39672 (M.D. Ga. Apr. 22, 2010).

Court of appeals affirmed a district court's judgment dismissing an action which an arrestee filed, pursuant to 42 U.S.C. § 1983, against a police officer and others because the action was filed more than two years after the arrestee was allegedly injured while being arrested, and the claim was untimely under O.C.G.A. § 9-3-33. The court rejected the arrestee's claims that the arrestee's lawsuit was timely under Georgia's renewal statute, O.C.G.A. § 9-2-61(a), and Fed. R. Civ. P. 15(c) based on the filing of an earlier lawsuit against the same police officer and the defendants who were not named in this second lawsuit less than two years after the arrestee was arrested because the claims in the original lawsuit were dismissed on the merits. Oduok v. Phillips, 2005 U.S. App. LEXIS 24958 (11th Cir. Nov. 18, 2005) (Unpublished).

Running of period in malicious prosecution action.

Arrestees' malicious prosecution claim was timely because the claim did not accrue until September 27, 2006, the date that the arrestees were acquitted of obstruction charges, and the arrestees filed their complaint on August 31, 2007. Valades v. Uslu, 301 Ga. App. 885, 689 S.E.2d 338 (2009), cert. denied, No. S10C0803, 2010 Ga. LEXIS 519 (Ga. 2010).

Running of Limitations (Cont'd)

Wrongful death claim for intentional termination of patient's life support tolled due to infancy of patient's child. — Two year statute of limitations for wrongful death applied to a suit alleging tortious termination of life support of a parent and that limitations period was tolled based on the infancy of the parent's child, who was born to the parent prior to the defendant terminating the parent's life support. DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823 (2007), cert. denied, 2008 Ga. LEXIS 477 (Ga. 2008).

Failure to exercise greatest possible diligence. — Although a personal injury litigant hired a "skip tracer," and received the report the next day, because that litigant neglected to attempt to move for an order for service by publication until almost two weeks later, and did not secure the order until over a month after that, and, there was no evidence of any contact between the litigant during the interim, the trial court did not err in finding that the litigant did not exercise the greatest possible diligence; moreover, a finding that the litigant exercised the requisite due diligence to authorize service by publication did not compel a finding that the litigant exercised the greatest possible diligence in serving the opposing party personally three months after the opposing party filed an answer, and nearly four months after the statute of limitation had run. Green v. Cimafranca, 288 Ga. App. 16, 653 S.E.2d 782 (2007).

Fraud not alleged or cited in record. — Former psychiatric inmate's pro se complaint alleging civil rights and other violations was properly dismissed based on expiration of the two-year statute of limitation of O.C.G.A. § 9-3-33. Although the inmate claimed that the statute of limitations was tolled by fraud, the inmate did not allege fraud or cite to evidence of fraud in the record, and the inmate did not show the existence of a 20-year statute of limitations. White v. City of Atlanta Police Dep't, 289 Ga. App. 575, 657 S.E.2d 545 (2008).

Failure to perfect service of process in a renewal action. — Passenger's personal injury action against a driver renewed pursuant to O.C.G.A. § 9-2-61 was dismissed for failure to perfect service of process against the driver due to lack of diligence. Although the passenger attempted to serve the driver for several months, the passenger then allowed 72 days to elapse before making another attempt. The court rejected the passenger's contention that O.C.G.A. § 33-7-11, providing for personal service after service of publication while allowing litigation against an uninsured motorist carrier to proceed, allowed for an additional 12 months after service by publication. Williams v. Patterson, 306 Ga. App. 624, 703 S.E.2d 74 (2010).

Failure to perfect service promptly. Because an insured did not serve a copy of an underinsured motorist complaint upon the insurer within the two year statute of limitations in O.C.G.A. § 9-3-33 or within 90 days of receiving the discovery responses indicating that the vehicle that hit the insured's vehicle was underinsured, the insured did not satisfy the service requirement of O.C.G.A. § 33-7-11(d). Calhoun v. Gov't Emples. Ins. Co., 296 Ga. App. 622, 675 S.E.2d 523 (2009).

Motorist sued a driver over injuries allegedly sustained in an auto accident. As the motorist took no steps whatsoever to perfect service for approximately four months after the limitations period of O.C.G.A. § 9-3-33 lapsed, the motorist did not act diligently; therefore, service of process did not relate back to the original filing date. McCullers v. Harrell, 298 Ga. App. 798, 681 S.E.2d 237 (2009), cert. denied, No. S09C1914, 2010 Ga. LEXIS 55 (Ga. 2010).

Evidence was sufficient to support the court's judgment dismissing the appellant's complaint against the appellee for failure to perfect service of process because the appellant failed to serve the appellee within five days of the two-year statute of limitations, O.C.G.A. § 9-3-33; the appellee proffered evidence that: (1) the appellee did not reside in the town where service was allegedly made at the time service was attempted; (2) the appellee's brother resided at that address during the relevant time period; and (3) the

appellee's brother advised the appellee of appellant's complaint after being provided with a copy of the complaint by the process server; and (4) the appellee also presented evidence from the appellee's landlord confirming that the appellee had lived at a different residence. Jones v. Lopez-Herrera, 308 Ga. App. 81, 706 S.E.2d 609 (2011).

Time computation method mandated by § 1-3-1.

Natural gas marketer's defamation complaint was timely filed because the complaint was filed on the first anniversary of the date of publication; O.C.G.A. § 1-3-1(d)(3) applies to the one-year statute of limitation for injuries to the reputation found in O.C.G.A. § 9-3-33, so that the first day shall not be counted in determining whether a claim is timely filed. Infinite Energy, Inc. v. Pardue, 310 Ga. App. 355, 713 S.E.2d 456 (2011).

Tolling of civil rights action.

State prisoner's 42 U.S.C. § 1983 claims related to the validity of a conviction on a guilty plea were properly dismissed under 28 U.S.C. §§ 1915A and 1915(e)(2) as Heck-barred, and the other claims were time-barred by the two-year limitations period of O.C.G.A. § 9-3-33 because a pending habeas petition did not create extraordinary circumstances to equitably toll the limitations period for the § 1983 claims. Salas v. Pierce, No. 08-11129, 2008 U.S. App. LEXIS 22075 (11th Cir. Oct. 23, 2008) (Unpublished).

Tolling not shown. — Couple had not shown that the statute of limitation on their personal injury claim against a second driver was tolled under O.C.G.A. § 9-3-99; the second driver, who had been cited for making an improper lane change, had paid the fine, and the couple had not provided any citation to the record to support their claim that the second driver remained subject to prosecution. McGhee v. Jones, 287 Ga. App. 345, 652 S.E.2d 163 (2007).

Plaintiffs, residents, sued the defendants, a chemical plant and a laboratory, alleging the plaintiffs were injured due to chemical fires at the laboratory's facility. As the plaintiffs failed to meet their burden to establish that O.C.G.A. § 9-3-33, the statute of limitations on the adult plaintiffs' personal injury claims, was tolled, the defendants were properly granted summary judgment on those claims. Smith v. Chemtura Corp., 297 Ga. App. 287, 676 S.E.2d 756 (2009).

When plaintiff federal prisoner knew of defendant state's forfeiture action in 1995, but filed a 42 U.S.C. § 1983 civil rights action alleging Fifth Amendment due process violations to recover the seized property seven years after O.C.G.A. § 9-3-33's two-year statute of limitations period expired, and no state court exhaustion was required, the suit was time-barred. Berry v. Keller, 2005 U.S. App. LEXIS 26917 (11th Cir. Dec. 6, 2005) (Unpublished).

There was no dispute that the defendant testing company transmitted the last of the test results on asphalt composition that the company provided to the Georgia Department of Transportation on November 22, 2004, and so plaintiff asphalt company had one year from that date to file the plaintiff's claim. The plaintiff did not file a complaint until October 10, 2006, almost a year too late. Douglas Asphalt Co. v. QORE, Inc., 657 F.3d 1146 (11th Cir. 2011).

Tenant failed to show mental incapacity sufficient, under O.C.G.A. §§ 9-3-90(a) and 9-3-91, to toll the statute of limitations in O.C.G.A. § 9-3-33 because the tenant's own testimony indicated that, with the exception of a two-week period of hospitalization, the tenant was able to manage the ordinary affairs of life following a tragic sexual assault; accordingly, the landlord was entitled to summary judgment on the tenant's premises-liability action. Martin v. Herrington Mill, LP, 316 Ga. App. 696, 730 S.E.2d 164 (2012).

In a case in which a district court dismissed a tenant's claims under the Americans with Disabilities Act (ADA) and the Rehabilitation Act as time-barred based upon the two-year statute of limitations in O.C.G.A. § 9-3-33, the tenant conceded that the complaint was filed more than two years after the last act of discrimination and unsuccessfully argued that the complaint was timely because the tenant was entitled to equitable tolling. The district court did not err in concluding that the tenant failed to show extraordinary

Running of Limitations (Cont'd)

circumstances justifying equitable tolling; contrary to the tenant's suggestion, nothing in the pleadings indicated that the U.S. Department of Housing and Urban Development misled the tenant into allowing the statute of limitations for the ADA and Rehabilitation Act claims to expire. Hunt v. Ga. Dep't of Cmty. Affairs, No. 12-10935, 2012 U.S. App. LEXIS 19535 (11th Cir. Sept. 18, 2012) (Unpublished).

Fraud not shown, thus no tolling. — Claim for pain and suffering was time barred under O.C.G.A. § 9-3-33 because O.C.G.A. § 9-3-96 failed to provide any tolling based on fraud since the very act of hiring a hit man to commit murder was not a separate and distinct fraud to support a finding of fraudulent concealment or actual fraud in and of itself in favor of the administrator of the victim's estate. Rai v. Reid, 294 Ga. 270, 751 S.E.2d 821 (2013).

Reinstatement of civil rights action permitted. — Plaintiff was allowed to reinstate an original 42 U.S.C. § 1983 complaint under Fed. R. Civ. P. 60(b) because of excusable neglect due to the fact that the renewal statute of O.C.G.A. § 9-2-61 was inapplicable to reinstate a second action barred by the limitations period of O.C.G.A. § 9-3-33, adequate grounds for relief were demonstrated, and no prejudice was shown. Highsmith v. Thomas, No. CV507-04, 2007 U.S. Dist. LEXIS 28964 (S.D. Ga. Apr. 18, 2007).

Action not subject to renewal. — Because an insured who brought a personal injury suit against an alleged tortfeasor had never personally served the alleged tortfeasor when the original action was filed, the action was not valid prior to dismissal and thus was not subject to renewal under O.C.G.A. § 9-2-61. Accordingly, the present action was time-barred under O.C.G.A. § 9-3-33. Williams v. Hunter, 291 Ga. App. 731, 662 S.E.2d 810 (2008).

Relation back of amendments to complaint.

Parking lot owner was entitled to dismissal of a plaintiff's negligence action arising from a January 19, 2005, incident because the amended complaint filed June 7, 2007, adding the owner as a defendant did not relate back under O.C.G.A. § 9-11-15(c) and, thus, was barred by the statute of limitations because the mere fact that the owner's attorney worked in the same firm as the original defendants' attorney did not impute knowledge of the lawsuit to the owner. LAZ Parking/Georgia, Inc. v. Jones, 294 Ga. App. 122, 668 S.E.2d 547 (2008).

Parents' suit alleging civil rights violations based on the alleged denial of an appropriate independent educational evaluation of their child was time-barred under the two year limitations period applicable to 42 U.S.C. § 1983 actions filed in Georgia because on the date that the limitations period had expired, the parents' first amended complaint had been dismissed, and the amended complaint did not replace or supersede the original complaint, and since the § 1983 claims in the original complaint had been dismissed, there remained nothing for the amendment to relate back to under Fed. R. Civ. P. 15(c). S.C. v. Cobb County Sch. Dist., No. 1:06-CV-2658-CC, 2011 U.S. Dist. LEXIS 156278 (N.D. Ga. Aug. 10, 2011).

Dismissal proper when statute of limitations not expired. — Prisoner's 42 U.S.C. § 1983 action was properly dismissed under Fed. R. Civ. P. 41(b) because the prisoner was ordered to complete certain forms and was told that failure to comply would result in a dismissal. Because the prisoner did not comply within five months and the dismissal was without prejudice before the two year statute of limitations under O.C.G.A. § 9-3-33 had expired, there was no abuse of discretion. Sanders v. Barrett, 2005 U.S. App. LEXIS 22496 (11th Cir. Oct. 17, 2005) (Unpublished).

9-3-33.1. Actions for childhood sexual abuse.

(a)(1) As used in this subsection, the term "childhood sexual abuse" means any act committed by the defendant against the plaintiff

which occurred when the plaintiff was under 18 years of age and which would be in violation of:

(A) Rape, as prohibited in Code Section 16-6-1;

(B) Sodomy or aggravated sodomy, as prohibited in Code Section 16-6-2;

(C) Statutory rape, as prohibited in Code Section 16-6-3;

(D) Child molestation or aggravated child molestation, as prohibited in Code Section 16-6-4;

(E) Enticing a child for indecent purposes, as prohibited in Code Section 16-6-5;

(F) Pandering, as prohibited in Code Section 16-6-12;

(G) Pandering by compulsion, as prohibited in Code Section 16-6-14;

(H) Solicitation of sodomy, as prohibited in Code Section 16-6-15;

(I) Incest, as prohibited in Code Section 16-6-22;

(J) Sexual battery, as prohibited in Code Section 16-6-22.1; or

(K) Aggravated sexual battery, as prohibited in Code Section 16-6-22.2.

(2) Notwithstanding Code Section 9-3-33 and except as provided in subsection (d) of this Code section, any civil action for recovery of damages suffered as a result of childhood sexual abuse committed before July 1, 2015, shall be commenced on or before the date the plaintiff attains the age of 23 years.

(b)(1) As used in this subsection, the term "childhood sexual abuse" means any act committed by the defendant against the plaintiff which occurred when the plaintiff was under 18 years of age and which would be in violation of:

(A) Trafficking a person for sexual servitude, as prohibited in Code Section 16-5-46;

(B) Rape, as prohibited in Code Section 16-6-1;

(C) Statutory rape, as prohibited in Code Section 16-6-3, if the defendant was 21 years of age or older at the time of the act;

(D) Aggravated sodomy, as prohibited in Code Section 16-6-2;

(E) Child molestation or aggravated child molestation, as prohibited in Code Section 16-6-4, unless the violation would be subject to punishment as provided in paragraph (2) of subsection

(b) of Code Section 16-6-4 or paragraph (2) of subsection (d) of Code Section 16-6-4;

(F) Enticing a child for indecent purposes, as prohibited in Code Section 16-6-5, unless the violation would be subject to punishment as provided in subsection (c) of Code Section 16-6-5;

(G) Incest, as prohibited in Code Section 16-6-22;

(H) Aggravated sexual battery, as prohibited in Code Section 16-6-22.2; or

(I) Part 2 of Article 3 of Chapter 12 of Title 16.

(2)(A) Notwithstanding Code Section 9-3-33, any civil action for recovery of damages suffered as a result of childhood sexual abuse committed on or after July 1, 2015, shall be commenced:

(i) On or before the date the plaintiff attains the age of 23 years; or

(ii) Within two years from the date that the plaintiff knew or had reason to know of such abuse and that such abuse resulted in injury to the plaintiff as established by competent medical or psychological evidence.

(B) When a plaintiff's civil action is filed after the plaintiff attains the age of 23 years but within two years from the date that the plaintiff knew or had reason to know of such abuse and that such abuse resulted in injury to the plaintiff, the court shall determine from admissible evidence in a pretrial finding when the discovery of the alleged childhood sexual abuse occurred. The pretrial finding required under this subparagraph shall be made within six months of the filing of the civil action.

(c)(1) As used in this subsection, the term:

(A) "Entity" means an institution, agency, firm, business, corporation, or other public or private legal entity.

(B) "Person" means the individual alleged to have committed the act of childhood sexual abuse.

(2) If a civil action for recovery of damages suffered as a result of childhood sexual abuse is commenced pursuant to division (b)(2)(A)(i) of this Code section and if the person was a volunteer or employee of an entity that owed a duty of care to the plaintiff, or the person and the plaintiff were engaged in some activity over which such entity had control, damages against such entity shall be awarded under this Code section only if by a preponderance of the evidence there is a finding of negligence on the part of such entity.

(3) If a civil action for recovery of damages suffered as a result of childhood sexual abuse is commenced pursuant to division (b)(2)(A)(ii) of this Code section and if the person was a volunteer or employee of an entity that owed a duty of care to the plaintiff, or the person and the plaintiff were engaged in some activity over which such entity had control, damages against such entity shall be awarded under this Code section only if by a preponderance of the evidence there is a finding that there was gross negligence on the part of such entity, that the entity knew or should have known of the alleged conduct giving rise to the civil action and such entity failed to take remedial action.

(d)(1) For a period of two years following July 1, 2015, plaintiffs of any age who were time barred from filing a civil action for injuries resulting from childhood sexual abuse due to the expiration of the statute of limitations in effect on June 30, 2015, shall be permitted to file such actions against the individual alleged to have committed such abuse before July 1, 2017, thereby reviving those civil actions which had lapsed or technically expired under the law in effect on June 30, 2015.

(2) The revival of a claim as provided in paragraph (1) of this subsection shall not apply to:

(A) Any claim that has been litigated to finality on the merits in a court of competent jurisdiction prior to July 1, 2015. Termination of a prior civil action on the basis of the expiration of the statute of limitations shall not constitute a claim that has been litigated to finality on the merits;

(B) Any written settlement agreement which has been entered into between a plaintiff and a defendant when the plaintiff was represented by an attorney who was admitted to practice law in this state at the time of the settlement, and the plaintiff signed such agreement; and

(C) Any claim against an entity, as such term is defined in subsection (c) of this Code section.

(3) This subsection shall be repealed effective July 1, 2017. (Code 1981, § 9-3-33.1, enacted by Ga. L. 1992, p. 2473, § 1; Ga. L. 2015, p. 675, § 2-2/SB 8; Ga. L. 2015, p. 830, § 2/HB 17.)

The 2015 amendments. — The first 2015 amendment, effective July 1, 2015, rewrote this Code section. The second 2015 amendment, effective July 1, 2015, rewrote this Code section, which formerly read: "(a) As used in this Code section, the term 'childhood sexual abuse' means any act committed by the defendant against the plaintiff which occurred when the plaintiff was under the age of 18 years and which would have been proscribed by Code Section 16-6-1, relating to rape; Code Section 16-6-2, relating to sodomy and aggravated sodomy; Code Section

16-6-3, relating to statutory rape; Code Section 16-6-4, relating to child molestation and aggravated child molestation; Code Section 16-6-5, relating to enticing a child for indecent purposes; Code Section 16-6-12, relating to pandering; Code Section 16-6-14, relating to pandering by compulsion; Code Section 16-6-15, relating to solicitation of sodomy; Code Section 16-6-22, relating to incest; Code Section 16-6-22.1, relating to sexual battery; or Code Section 16-6-22.2, relating to aggravated sexual battery, or any prior laws of this state of similar effect which were in effect at the time the act was committed.

"(b) Any civil action for recovery of damages suffered as a result of childhood sexual abuse shall be commenced within five years of the date the plaintiff attains the age of majority." See the Code Commission note regarding the effect of these amendments.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2015, the amendment of paragraph (b)(2) of this Code section by Ga. L. 2015, p. 675, § 2-2/SB 8, was treated as impliedly repealed and superseded by Ga. L. 2015, p. 830, § 2/HB 17, due to irreconcilable conflict.

Editor's notes. — Ga. L. 2015, p. 675, § 1-1/SB 8, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Safe Harbor/Rachel's Law Act.'"

Ga. L. 2015, p. 675, § 1-2/SB 8, not codified by the General Assembly, provides: "(a) The General Assembly finds that arresting, prosecuting, and incarcerating victimized children serves to retraumatize children and increases their feelings of low self-esteem, making the process of recovery more difficult. The General Assembly acknowledges that both federal and state laws recognize that sexually exploited children are the victims of crime and should be treated as victims. The General Assembly finds that sexually exploited children deserve the protection of child welfare services, including family support, crisis intervention, counseling, and emergency housing services. The General Assembly finds that it is necessary and appropriate to adopt uniform and reasonable assessments and regulations to help address the deleterious secondary effects, including but not limited to, prostitution and sexual exploitation of children, associated with adult entertainment establishments that allow the sale, possession, or consumption of alcohol on premises and that provide to their patrons performances and interaction involving various forms of nudity. The General Assembly finds that a correlation exists between adult live entertainment establishments and the sexual exploitation of children. The General Assembly finds that adult live entertainment establishments present a point of access for children to come into contact with individuals seeking to sexually exploit children. The General Assembly further finds that individuals seeking to exploit children utilize adult live entertainment establishments as a means of locating children for the purpose of sexual exploitation. The General Assembly acknowledges that many local governments in this state and in other states found deleterious secondary effects of adult entertainment establishments are exacerbated by the sale, possession, or consumption of alcohol in such establishments.

"(b) The purpose of this Act is to protect a child from further victimization after he or she is discovered to be a sexually exploited child by ensuring that a child protective response is in place in this state. The purpose and intended effect of this Act in imposing assessments and regulations on adult entertainment establishments is not to impose a restriction on the content or reasonable access to any materials or performances protected by the First Amendment of the United States Constitution or Article I, Section I, Paragraph V of the Constitution of this state."

Ga. L. 2015, p. 830, § 1/HB 17, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Hidden Predator Act.'"

9-3-34. Article not applicable to malpractice.

JUDICIAL DECISIONS

Loss of consortium claim arising out of medical malpractice. — Because the four-year time limit does not apply to loss of consortium claims arising out of medical malpractice, and the plaintiffs only have two years in which to file the plaintiffs' claims for loss of consortium arising out of medical malpractice, the spouse's loss of consortium claim was time barred as the claim was filed more than two years after the patient's injury. Beamon v. Mahadevan, 329 Ga. App. 685, 766 S.E.2d 98 (2014).

9-3-35. Actions by creditor seeking relief under Uniform Voidable Transactions Act.

An action by a creditor seeking relief under the provisions of Article 4 of Chapter 2 of Title 18, known as the "Uniform Voidable Transactions Act," shall be brought within the applicable period set out in Code Section 18-2-79. (Code 1981, § 9-3-35, enacted by Ga. L. 2002, p. 141, § 1; Ga. L. 2015, p. 996, § 4B-1/SB 65.)

The 2015 amendment, effective July 1, 2015, substituted "Voidable Transactions" for "Fraudulent Transfers" in this Code section. See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides:

"(a) This Act shall be known and may be cited as the 'Debtor Creditor Uniform Law Modernization Act of 2015.'

"(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships."

Ga. L. 2015, p. 996, § 7-1/SB 65, not codified by the General Assembly, provides in part: "(d) The amendments made by Parts 4A and 4B of this Act shall:

"(1) Apply to a transfer made or obligation incurred on or after July 1, 2015;

"(2) Not apply to a transfer made or obligation incurred before July 1, 2015;

"(3) Not apply to a right of action that has accrued before July 1, 2015; and

"(4) For purposes of this subsection, a transfer is made and an obligation is incurred at the time provided in Code Section 18-7-76."

ARTICLE 3

LIMITATIONS ON RECOVERY FOR DEFICIENCIES CONNECTED WITH IMPROVEMENTS TO REALTY AND RESULTING INJURIES

9-3-50. Definitions.

JUDICIAL DECISIONS

Substantial completion meant action time barred. — Trial court erred in denying a developer's motion for summary judgment on the homeowners' claim for

negligent construction because the developer presented testimony that the sale of the last townhouse closed on December 8, 2004, and that on the date of closing, construction of the townhouses was substantially complete; thus, O.C.G.A. § 9-3-51, the statute of repose, barred any action filed after December 8, 2012, and the homeowners filed the homeowners' suit two months after that date. Ashton Atlanta Residential, LLC v. Ajibola, 331 Ga. App. 231, 770 S.E.2d 311 (2015).

Cited in Wilks v. Overall Constr., Inc., 296 Ga. App. 410, 674 S.E.2d 320 (2009).

9-3-51. Limitations on recovery for deficiency in planning, supervising, or constructing improvement to realty or for resulting injuries to property or person.

Law reviews. — For annual survey of construction law, see 62 Mercer L. Rev. 71 (2010). For article, "Construction Law," see 63 Mercer L. Rev. 107 (2011).

JUDICIAL DECISIONS

Analysis

2. Application

2. Application

Work done constituted improvement.

Georgia's eight-year statute of repose for improvements to real property, O.C.G.A. § 9-3-51, barred a claim against an installer of asbestos at a paper mill where a claimant worked because the installation and removal of old insulation constituted an improvement to real property under the realty statute of repose, and the dust and debris associated with the improvement to real property was covered by O.C.G.A. § 9-3-51(a). Toole v. Georgia-Pacific, LLC, No. A10A2179, 2011 Ga. App. LEXIS 810 (Jan. 19, 2011).

Improvement that works properly cannot be deemed as having a "deficiency." — Because O.C.G.A. § 9-3-51 specifically applies to "deficiencies" in the design or construction of an improvement to real property that causes personal injury or property damage, it follows that, while an improvement that works properly and does not cause any damage arguably "adds value" to the property, it could not be deemed as having a "deficiency"; because it caused no damage, no cause of action would arise from its use, and, therefore, the statute would not apply in such a case. Wilhelm v. Houston County, 310 Ga. App. 506, 713 S.E.2d 660 (2011), cert. denied, 2012 Ga. LEXIS 219 (Ga. 2012).

Contractor's contribution action against subcontractors could be maintained without a prior judgment. — Trial court erred in dismissing a contractor's independent suit against several subcontractors for contribution and indemnity. Under O.C.G.A. § 51-12-32, the contractor was not required to suffer a judgment against it in an underlying suit before pursuing its right of contribution, and the contractor needed to protect its rights before expiration of the construction statute of repose, O.C.G.A. § 9-3-51. R. Larry Phillips Constr. Co. v. Muscogee Glass, 302 Ga. App. 611, 691 S.E.2d 372, cert. denied, No. S10C1105, 2010 Ga. LEXIS 568; cert. denied, No. S10C1094, 2010 Ga. LEXIS 587 (Ga. 2010).

Company's suit against contractor for indemnification not barred. — Power company sued a former contractor seeking indemnification under the parties' contracts for litigation expenses the company incurred in a wrongful death suit filed by the estate of the contractor's former employee. The company's suit was not barred by O.C.G.A, § 9-3-51 as the suit did not allege that the contractor's construction was deficient, and the indemnification provisions did not require such a showing. Nat'l Serv. Indus. v. Ga. Power Co., 294 Ga. App. 810, 670 S.E.2d 444 (2008).

Defective construction action time barred.

According to a purchaser, the acts of a county, the county health department, and builders that resulted in the problems the purchaser experienced were not just related to the "construction of an improvement to real property," the improvements were essential to such construction and occurred prior to the substantial completion of the improvement; accordingly, any cause of action for damage to real property that resulted from the deficiencies in such construction was subject to the eight-year statute of repose in O.C.G.A. § 9-3-51. Wilhelm v. Houston County, 310 Ga. App. 506, 713 S.E.2d 660 (2011), cert. denied, 2012 Ga. LEXIS 219 (Ga. 2012).

Purchaser's claims against a county, the county health department, and builders were barred by the statute of repose, O.C.G.A. § 9-3-51, because the purchaser's house and the septic system were completed before the purchaser moved in, but the purchaser did not file suit for damages allegedly resulting from construction defects in the septic system and/or the development of the property until more than nine years later. Wilhelm v. Houston County, 310 Ga. App. 506, 713 S.E.2d 660 (2011), cert. denied, 2012 Ga. LEXIS 219 (Ga. 2012).

Trial court erred in denying a developer's motion for summary judgment on the homeowners' claim for negligent construction because the developer presented testimony that the sale of the last townhouse closed on December 8, 2004, and that on the date of closing, construction of the townhouses was substantially complete; thus, O.C.G.A. § 9-3-51, the statute of repose, barred any action filed after December 8, 2012, and the homeowners filed the homeowners' suit two months after that date. Ashton Atlanta Residential, LLC v. Ajibola, 331 Ga. App. 231, 770 S.E.2d 311 (2015).

Claims barred after expiration of eight-year repose period regardless of builder's alleged fraud in construction. — Because a homeowner was injured in a deck collapse after the eight-year statute of repose period of O.C.G.A. § 9-3-51(a) had expired, it was irrelevant whether the builder had fraudulently covered up its allegedly negligent construction of the deck at the time it was built 11 years earlier. The owner's action for injuries was barred. Rosenberg v. Falling Water, Inc., 302 Ga. App. 78, 690 S.E.2d 183 (2009), aff'd, No. S10G0877, 2011 Ga. LEXIS 249 (Ga. 2011).

Court of appeals properly affirmed the trial court's grant of summary judgment to a contractor in a homeowner's action to recover damages for injuries the homeowner sustained when a deck collapsed because the homeowner's right to file suit never accrued since the homeowner was not personally injured until years after the statute of repose time period expired; the injuries the homeowner sustained occurred more than a decade after the home had been substantially completed by the contractor, and the contractor took no action to prevent the homeowner from discovering a cause for the injuries or to dissuade the homeowner from filing suit with respect to the injuries, even if such a cause of action existed. Rosenberg v. Falling Water, Inc., 289 Ga. 57, 709 S.E.2d 227 (2011).

Planning and design claim barred. — Engineering firm was properly granted summary judgment in the driver's negligent planning and design action because the eight-year statute of repose in O.C.G.A. § 9-3-51 applied when the road was "an improvement to real property" in that the road was permanent in nature and added value to the property by allowing the public to efficiently traverse the county. Feldman v. Arcadis US, Inc., 316 Ga. App. 158, 728 S.E.2d 792 (2012).

Nuisance claim barred by statute of repose. — Purchaser's nuisance claims against a county, the county health department, and builders were barred by the statute of repose, O.C.G.A. § 9-3-51, because the purchaser could not maintain a nuisance action under the facts asserted in the plaintiff's complaint; a plaintiff cannot maintain a nuisance claim that is based upon damage to a house resulting from a defect constructed into the house that was concealed from the plaintiff by the builder and/or the seller because, instead, the applicable causes of action are fraud against the seller and/or negligent construction against the builder. Wilhelm

2. Application (Cont'd)

v. Houston County, 310 Ga. App. 506, 713 S.E.2d 660 (2011), cert. denied, 2012 Ga. LEXIS 219 (Ga. 2012).

ARTICLE 4

LIMITATIONS FOR MALPRACTICE ACTIONS

Law reviews. — For article, "State of Emergency: Why Georgia's Standard of Care in Emergency Rooms is Harmful to Your Health," see 45 Ga. L. Rev. 275 (2010). For article, "When Do State Laws Determine ERISA Plan Benefit Rights?," see 47 J. Marshall L. Rev. 145 (2014).

RESEARCH REFERENCES

ALR. — Effect of fraudulent or negligent concealment of patient's cause of action on timeliness of action under medical malpractice statute of repose, 19 ALR6th 475.

9-3-70. "Action for medical malpractice" defined.

Law reviews. — For article, "State of Emergency: Why Georgia's Standard of Care in Emergency Rooms is Harmful to Your Health," see 45 Ga. L. Rev. 275 (2010). For article, "When Do State Laws Determine ERISA Plan Benefit Rights?," see 47 J. Marshall L. Rev. 145 (2014).

JUDICIAL DECISIONS

Intentional termination of life support a wrongful death claim, not a malpractice claim. — Trial court properly refused to dismiss a plaintiff's claim asserting tortious termination of life support based on the defendant's argument that it was really a medical malpractice claim and, therefore, required an expert medical affidavit under O.C.G.A. § 9-11-9.1; because such a claim is a suit for wrongful death, not medical malpractice, no expert medical affidavit was necessary. DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823 (2007), cert. denied, 2008 Ga. LEXIS 477 (Ga. 2008).

Actions against infertility clinic. — Under O.C.G.A. § 9-3-70, in a married couple's suit based on an infertility clinic's failure to preserve sperm, claims against two employees of the clinic were claims for professional negligence, not for ordinary negligence, and thus were time-barred under O.C.G.A. § 9-3-71(a); the employees were involved in the process of thawing and using the husband's sperm in order to fertilize the wife's eggs, and the employees performed these technical functions within the scope of their employment and under the supervision of licensed medical doctors. Baskette v. Atlanta Ctr. for Reprod. Med., LLC, 285 Ga. App. 876, 648 S.E.2d 100 (2007), cert. denied, 2008 Ga. LEXIS 103 (Ga. 2008).

Actions against privately operated prisons. — Former federal inmate's argument alleging that the Bivens decision should be extended to the inmate's Eighth Amendment claim against private prison employees because the affidavit requirement of O.C.G.A. § 9-11-9.1(a) made recovery only theoretical under state law failed; not only did the complaint not allege a claim for medical malpractice as defined by O.C.G.A. § 9-3-70, but even if it did the inmate stood in the same shoes as anyone else in Georgia filing a professional malpractice claim and was subject to no stricter rules than the rest of Georgia's residents. Alba v. Montford, 517 F.3d 1249 (11th Cir. 2008), cert. denied, 129 S. Ct. 632, 172 L.Ed.2d 619 (2008).

No cause of action found. — Patient could not bring a professional liability claim for damages against a family doctor for interference with the patient's marriage, loss of affection, or depression and anxiety that resulted from the doctor having an affair with the patient's wife because O.C.G.A. § 51-1-17 abolished tort claims for adultery. The claim was not an action for medical malpractice under O.C.G.A. § 9-3-70 because the patient failed to allege an error of professional skill or judgment with regard to the doctor's care. Witcher v. McGauley, 316 Ga. App. 574, 730 S.E.2d 56 (2012).

Exclusive remedy under Workers' Compensation Act. — There is no controlling authority for the premise that an employee injured as a result of medical malpractice may, consistent with the exclusive remedy provision of the Workers' Compensation Act, O.C.G.A. § 34-9-11, bring a medical malpractice action against a certified athletic trainer. McLeod v. Blase, 290 Ga. App. 337, 659 S.E.2d 727 (2008).

Claim of medical malpractice time barred. — Trial court properly struck, as time barred, the breach of fiduciary duty claim because the gravamen of that claim was the doctor's alleged failure to correctly read the patient's ultrasound and the failure to diagnose the patient's medical condition, amounting to a claim of negligence that went to the propriety of the doctor's exercise of medical skill and judgment, a medical malpractice as contemplated by O.C.G.A. §§ 9-3-70 and 9-3-71(b). Johnson v. Jones, 327 Ga. App. 371, 759 S.E.2d 252 (2014).

Cited in Carr v. Kindred Healthcare Operating, Inc., 293 Ga. App. 80, 666 S.E.2d 401 (2008).

9-3-71. General limitation.

Law reviews. — For survey article on tort law, see 60 Mercer L. Rev. 375 (2008). For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008). For article, "Misdiagnosis Law in Georgia: Where Are We Now?," see 16 (No. 5) Ga. St. B.J. 14 (2011).

JUDICIAL DECISIONS

Analysis

General Consideration

Constitutionality of statute of repose.

Statute of repose for medical malpractice suits under O.C.G.A. § 9-3-71(b) did not violate the equal protection clauses of the federal or Georgia Constitutions. There was a rational basis for treating medical malpractice differently from other forms of professional malpractice and for the five-year repose period itself, based on the considerations that uncertainty over the causes of illness and injury made it difficult for insurers to adequately assess premiums and that the passage of time made it more difficult to determine the cause of injury. Nichols v. Gross, 282 Ga. 811, 653 S.E.2d 747 (2007).

Construction with § 9-3-73. — In a medical malpractice action, because the trial court erroneously applied the five-year statute of repose contained in O.C.G.A. § 9-3-71(b), and not O.C.G.A. § 9-3-73, in finding that the parents' amended negligence complaint against certain doctors and nurses was time-barred, the trial court erred in entering summary judgment against the parents; further, the trial court also erred in finding that the doctors and nurses were rendering care to only the mother, and not the mother and the newborn child. Johnson v. Thompson, 286 Ga. App. 810, 650

General Consideration (Cont'd)

S.E.2d 322 (2007), cert. denied, 2008 Ga. LEXIS 90 (Ga. 2008).

Continuous treatment doctrine did not apply.

Georgia Court of Appeals erred in holding that, if a plaintiff in a misdiagnosis case presents with additional or significantly increased symptoms of the same misdiagnosed disease, the medical malpractice statute of limitations and statute of repose do not bar the plaintiff's claims. Such holding adopted a variant of the previously rejected continuing treatment doctrine and presented a reinterpretation of the term injury set forth in O.C.G.A. § 9-3-71(a). Kaminer v. Canas, 282 Ga. 830, 653 S.E.2d 691 (2007), cert. denied, 553 U.S. 1065, 128 S. Ct. 2503, 171 L.E.2d 786 (2008).

Separate acts of professional negligence. — Because a medical malpractice complaint alleged that within the five-year period prior to the filing of the complaint, three doctors committed separate acts of professional negligence in, inter alia, failing to warn a patient about developing overwhelming post-splenectomy infection, those subsequent negligent acts causing new injuries were subject to separate periods of repose under O.C.G.A. § 9-3-71; subsection (b) of § 9-3-71 did not limit the number of separate negligent acts that could act as a trigger. Schramm v. Lyon, 285 Ga. 72, 673 S.E.2d 241 (2009).

Subsection (a) of O.C.G.A. § 9-3-71 was applicable, etc.

Because the evidence presented on appeal adequately showed that the decedent estate's claim filed by the personal representative under O.C.G.A. § 51-4-5 was filed two months after the two-year statute of limitation under O.C.G.A. § 9-3-71(a) expired, despite the application of O.C.G.A. § 9-3-92, the trial court properly dismissed the claim as time-barred. Goodman v. Satilla Health Servs., 290 Ga. App. 6, 658 S.E.2d 792 (2008).

In a medical malpractice action brought by a patient and a spouse against a doctor, the doctor's practice group, and a hospital, the trial court erred by granting summary judgment to the doctor and the practice group since the patient sufficiently alleged that total incontinence from the negligent implantation of radioactive seeds in the healthy part of the patient's prostrate occurred prior to the running of the two year statute of limitations set forth in O.C.G.A. § 9-3-71(a) based on evidence from which it was inferrable that the doctor knew of the improper conduct and tried to cover up such conduct. However, as to the hospital, the patient and the spouse failed to argue any enumeration of error in the appellate brief and, therefore, no argument was preserved for appeal and the grant of summary judgment to the hospital was proper. Lee v. McCord, 292 Ga. App. 707, 665 S.E.2d 414 (2008), aff'd, 304 Ga. App. 377, 696 S.E.2d 338 (2010).

New injury exception is not predicated on a patient's discovery of a physician's negligence as the trigger for commencement of the statute of limitations is the date that the patient received the new injury, which is determined to be an occurrence of symptoms following an asymptomatic period. Amu v. Barnes, 283 Ga. 549, 662 S.E.2d 113 (2008).

Subsequent injury exception. — In a medical malpractice action, because the subsequent injury exception did not disregard O.C.G.A. § 9-3-71(a), but rather attempted to reconcile the statute's "date of injury" language with the fact that it was often difficult or impossible in the misdiagnosis context to calculate precisely when a new injury arose, the trial court committed no error in applying the subsequent injury exception in the case; furthermore, contrary to the doctor's characterization, the subsequent injury exception did not simply create a discovery rule in violation of § 9-3-71(a). Amu v. Barnes, 286 Ga. App. 725, 650 S.E.2d 288 (2007), aff'd, 283 Ga. 549, 662 S.E.2d 113 (2008).

In a negligent misdiagnosis case, the trial and appellate courts properly determined that the two year statute of limitations set forth in O.C.G.A. § 9-3-71(a) had not run on plaintiff's claim for the injury of colon cancer that resulted from the misdiagnosis of a hemorrhoid condition made by a doctor as the cancer was a new injury that did not exist at the time of the

original misdiagnosis. Amu v. Barnes, 283 Ga. 549, 662 S.E.2d 113 (2008).

In a medical malpractice case based on a doctors' failure to diagnose a patient's cancer, which later metastasized, the doctors failed to establish as a matter of law that the patient's "new injury" occurred and manifested itself more than two years before the suit was filed; thus, the doctors were not entitled to summary judgment on grounds that the suit was time-barred under O.C.G.A. § 9-3-71(a). O.C.G.A. § 9-3-71(a)'s two-year statute of limitations commences the date the patient first experiences symptoms of a "new injury" following a symptom-free period, not on the date the patient "discovers" either the injury or the doctor's negligence. Cleaveland v. Gannon, 284 Ga. 376, 667 S.E.2d 366 (2008).

Court of appeals erred by utilizing the "new injury" exception to the general rule for determining commencement of the limitations period under O.C.G.A. § 9-3-71(a) in negligent misdiagnosis cases because a patient's medical malpractice action against a doctor and a medical practice did not involve a misdiagnosis, and the court of appeals expressly found that the action was not a misdiagnosis case, but it treated the matter as a "new injury" case, which was a concept specific to the jurisprudence of misdiagnosis cases and was limited to misdiagnosis cases involving a very discreet set of circumstances; even if the "new injury" exception to misdiagnosis cases was applicable, the matter would still not be a "new injury" case because the patient was diagnosed with prostate cancer, was treated for prostate cancer, and still had prostate cancer. McCord v. Lee, 286 Ga. 179, 684 S.E.2d 658 (2009).

Intentional termination of life support a wrongful death claim, not a malpractice claim. — Trial court properly refused to dismiss a plaintiff's claim asserting tortious termination of life support based on the defendant's argument that it was really a medical malpractice claim and, therefore, required an expert medical affidavit under O.C.G.A. § 9-11-9.1; because such a claim is a suit for wrongful death, not medical malpractice, no expert medical affidavit was necessary. DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823 (2007), cert. denied, 2008 Ga. LEXIS 477 (Ga. 2008).

Two year statute of limitations for wrongful death applied to a suit alleging tortious termination of life support of a parent, and that limitations period was tolled based on the infancy of the parent's child, who was born to the parent prior to the defendant terminating the parent's life support. DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823 (2007), cert. denied, 2008 Ga. LEXIS 477 (Ga. 2008).

Cited in Chandler v. Opensided MRI of Atlanta, LLC, 299 Ga. App. 145, 682 S.E.2d 165 (2009).

Procedural Requirements

Wrongful death claim added via amendment to timely complaint. — When a patient and the patient's spouse filed a medical malpractice complaint, which the spouse amended after the patient's death to add a wrongful death claim, the wrongful death claim was not barred by the statute of repose as the wrongful death claim did not initiate legal proceedings, but was filed as an amendment to a pending suit that timely asserted other claims arising out of the same alleged malpractice; this result was consistent with the legislative purpose of the statute of repose set forth in O.C.G.A. § 9-3-73(f), as the original medical malpractice allegations had been brought less than two years after the alleged negligence, and the wrongful death claim was based on the same alleged acts and omissions as the earlier claims. Wesley Chapel Foot & Ankle Ctr., LLC v. Johnson, 286 Ga. App. 881, 650 S.E.2d 387 (2007), cert. denied, 2007 Ga. LEXIS 820 (Ga. 2007).

Application of Timing Principles

Accrual of action.

In a medical malpractice action, because the undisputed evidence showed that both the personal injury claims and a later-added wrongful death claim were timely filed, both in terms of O.C.G.A. § 9-3-71 and the relevant statute of repose, the doctors sued were properly de-

Application of Timing Principles (Cont'd)

nied summary judgment as to those claims. Cleaveland v. Gannon, 288 Ga. App. 875, 655 S.E.2d 662 (2007), aff'd, 284 Ga. 376, 667 S.E.2d 366 (2008).

Amending complaint to change named plaintiff not initiation. — Decedent's sibling, as the purported representative of the decedent's spouse, filed a wrongful death suit against medical providers within five years of the alleged negligent acts and, within a reasonable time after the providers objected to the sibling's standing, filed a motion to amend the complaint to name the decedent's spouse as the real party in interest. As the proposed amendment did not "initiate" a new claim, the medical malpractice statute of repose, O.C.G.A. § 9-3-71(b), did not prevent amendment of the complaint even though the motion to amend was filed more than five years after the alleged negligence. Rooks v. Tenet Health Sys. GB, Inc., 292 Ga. App. 477, 664 S.E.2d 861 (2008).

Addition of party not warranted. — Request by a deceased patient's widow to add the treating physician's employer to the widow's medical malpractice action was properly denied as the widow failed to show that the employer had notice of the institution of the lawsuit prior to the expiration of the statute of limitations; notice to the hospital and the physician of the institution of litigation did not constitute notice to the employer, even though they were all insured by the same carrier. Hunter v. Emory-Adventist, Inc., 323 Ga. App. 537, 746 S.E.2d 734 (2013).

Accrual of action for wrongful death.

When a patient and the patient's spouse filed a medical malpractice complaint which the spouse amended after the patient's death to add a wrongful death claim, the wrongful death claim was not barred by the statute of limitations as it had been filed within two years of the patient's death. Wesley Chapel Foot & Ankle Ctr., LLC v. Johnson, 286 Ga. App. 881, 650 S.E.2d 387 (2007), cert. denied, 2007 Ga. LEXIS 820 (Ga. 2007).

Medical malpractice action was time-barred. — Patient was suffering from poisoning from an antibiotic with symptoms including substantial renal damage and nausea by May 15, 2002, which was the proximate result of either the physician's course of treatment with the drug, the physician's failure to recognize the toxic condition and symptoms resulting from that treatment, or both; the fact that the patient did not know the cause of the patient's symptoms did not lead to a different result. Smith v. Harris, 294 Ga. App. 333, 670 S.E.2d 136 (2008), cert. denied, No. S09C0428, 2009 Ga. LEXIS 328 (Ga. 2009).

Trial court did not err when the court held that the medical malpractice allegations of the original complaint were barred by O.C.G.A. § 9-3-71(b) as the alleged negligence occurred nine to ten years before the complaint was filed, and the parents' claim that the defendants should be estopped from asserting a statute-of-repose defense due to fraud was not supported by any evidence. Macfarlan v. Atlanta Gastroenterology Assocs., 317 Ga. App. 887, 732 S.E.2d 292 (2012).

Patient's medical malpractice action was time barred by the two-year statute of limitations because it was the initial October 2007 surgery, in which the patient allegedly received negligent treatment, that gave rise to the patient's cause of action, not the March 2009 surgery to correct the 2007 surgery; the patient's injury from the negligent treatment began manifesting itself from March to June 2008 thus, by March to June 2008 at least, the patient had suffered an injury and could have maintained a malpractice action to a successful result by showing a breach of the standard of care by the first surgeon. Beamon v. Mahadevan, 329 Ga. App. 685, 766 S.E.2d 98 (2014).

In misdiagnosis cases, the misdiagnosis itself is the "injury", etc.

Although a patient was not diagnosed with drug-induced tardive dyskinesia based on the patient's doctor's prescription of a drug for reflux until May 2005, and the patient's complaint was filed within two years of that date, the relevant date was the date of injury, or when the patient first exhibited symptoms, which was in the summer of 2004. Therefore, the patient's claims were time barred under

O.C.G.A. § 9-3-71(a). Deen v. Pounds, 312 Ga. App. 207, 718 S.E.2d 68 (2011).

In order to toll the statute of limitations, etc.

Trial court did not err in denying a doctor's motion to dismiss an administrator's professional negligence claim because the new professional negligence claim related back to the date of the original complaint and was not barred by the two-year statute of limitation as both the original complaint and the amended complaint set forth allegations based upon the decedent's surgery, emergency room visit, and discharge relating to the care received from the doctor following the laparoscopic gallbladder surgery the doctor performed. Jensen v. Engler, 317 Ga. App. 879, 733 S.E.2d 52 (2012).

No renewal refiling for reposed action.

Because the children of a decedent refiled their complaint against the operators of a nursing home more than five years after the death of their mother or the alleged wrongful acts occurred, their claims were subject to dismissal under the statute of repose of O.C.G.A. § 9-3-71(b). Carr v. Kindred Healthcare Operating, Inc., 293 Ga. App. 80, 666 S.E.2d 401 (2008).

Because dismissal of a medical malpractice suit for failure to comply with the expert affidavit requirements rendered the suit void and incapable of being renewed under O.C.G.A. § 9-2-61, and the two-year limitation period in O.C.G.A. § 9-3-71(a) had expired, the suit was properly dismissed. Hendrix v. Fulton DeKalb Hosp. Auth., 330 Ga. App. 833, 769 S.E.2d 575 (2015).

Allegation sufficient to raise issue of fraud.

Evidence that a nurse-midwife, hospital, and medical practice deliberately misrepresented and withheld information concerning a baby's condition before and just after the baby's birth was sufficient to create a jury question as to whether they committed fraud sufficient to toll the statute of limitations and estop the application of the statute of repose, O.C.G.A. § 9-3-71(a), pursuant to O.C.G.A. § 9-3-96. Wilson v. Obstetrics & Gynecology of Atlanta, P.C., 304 Ga. App. 300, 696 S.E.2d 339 (2010).

Allegation insufficient to raise issue of fraud.

Trial court did not err in granting a doctor's motion for judgment on the pleadings on the ground that a patient failed to file a medical malpractice complaint within the two-year period of limitation for medical malpractice claims pursuant to O.C.G.A. § 9-3-71(a) because the limitation period did not remain tolled due to the doctor's alleged fraudulent statements; the doctor's assertion that the doctor had not done anything wrong did not prevent the patient from asking any of the doctors that treated the patient over the next several months about what could have caused a needle to break in the patient's cheek. Pryce v. Rhodes, 316 Ga. App. 523, 729 S.E.2d 641 (2012).

Plaintiff's bankruptcy does not toll statute. — Because the pendency of a patient's bankruptcy petition did not operate to toll the medical malpractice statute of repose, the trial court properly dismissed the suit for failing to state a claim upon which relief could be granted. Flott v. Southeast Permanente Med. Group, Inc., 288 Ga. App. 730, 655 S.E.2d 242 (2007), cert. dismissed, 2008 Ga. LEXIS 387 (Ga. 2008).

New and separate acts of negligence. — In a medical malpractice suit, a trial court erred by dismissing three doctors who were seen by the patient five years prior to the date the suit was filed because, in applying the statute of repose, O.C.G.A. § 9-3-71(b), the patient properly asserted that each doctor committed a new and separate act of negligence each time the doctors saw the patient. Lyon v. Schramm, 291 Ga. App. 48, 661 S.E.2d 178 (2008), aff'd, Schramm v. Lyon, 285 Ga. 72, 673 S.E.2d 241 (2009).

Substitution of real party in interest did not bar action. — Although an estate's malpractice action was not initially brought by the real party in interest — the estate's administrator — the administrator was timely substituted as the plaintiff in the action by amendment which, under O.C.G.A. § 9-11-17(a), had the same effect as if the action had been commenced by the real party in interest. Thus, the suit was not time-barred by O.C.G.A. § 9-3-71(b)'s five-year repose pe-

Application of Timing Principles (Cont'd)

riod, and a doctor and health care facilities were not entitled to summary judgment. Memar v. Styblo, 293 Ga. App. 528, 667 S.E.2d 388 (2008).

Specific Actions

Foreign object medical malpractice action.

In a medical malpractice action, it is for a jury to determine whether a patient by exercising ordinary care should have learned on December 7, 2005, or on December 9, 2005, that a foreign object had been left in the patient's body during the performance of surgery in 2001 and the decision of the jury would govern whether the statute of limitations in O.C.G.A. § 9-3-71 or O.C.G.A. § 9-3-72 controlled. Monfort v. Colquitt County Hosp. Auth., 288 Ga. App. 202, 653 S.E.2d 535 (2007), cert. denied, 2008 Ga. LEXIS 225 (Ga. 2008).

By requiring in O.C.G.A. § 9-3-72 that a patient who claims a foreign object was negligently left in the patient's body must file an action within one year after the negligent act or omission is discovered, the Georgia General Assembly has adopted the continuing tort rule; therefore, based upon the plain language and the legislative intent of O.C.G.A. § 9-3-72, the Georgia Court of Appeals overrules both Pogue v. Goodman, 282 Ga. App. 385 (638 S.E.2d 824) (2006) and Shannon v. Thornton, 155 Ga. App. 670 (272 S.E.2d 535) (1980) as these cases improperly limit the statute's application. Norred v. Teaver, 320 Ga. App. 508, 740 S.E.2d 251 (2013).

Georgia Court of Appeals has reinterpreted the exception under O.C.G.A. § 9-3-72 to the one-year limitation period in medical malpractice cases for foreign objects left in the body to apply whether the object was left intentionally or unintentionally; thus, a trial court erred in granting summary judgment to a dentist who left a cotton pellet in a patient's tooth as the claim was not time barred. Norred v. Teaver, 320 Ga. App. 508, 740 S.E.2d 251 (2013).

Inadvertent or intentional leaving of object in body. — No language in O.C.G.A. § 9-3-72 limits the statute's application to only those foreign objects left inadvertently as such an interpretation of the statute would allow a defendant-doctor to unilaterally bar a plaintiff's claim, that has already fallen outside of the general limitation period, merely by asserting that the physician left the foreign object in the patient's body intentionally, no matter how absurd the assertion. Norred v. Teaver, 320 Ga. App. 508, 740 S.E.2d 251 (2013).

Misdiagnosis claims. — In most misdiagnosis cases, the injury begins immediately upon the misdiagnosis due to pain, suffering, or economic loss sustained by the patient from the time of the misdiagnosis until the medical problem is properly diagnosed and treated, with the misdiagnosis itself being the injury and not the subsequent discovery of the proper diagnosis. In most misdiagnosis cases, the two-year statute of limitations and the five-year statute of repose begins to run simultaneously on the date that the doctor negligently failed to diagnose the condition and, thereby, injured the patient. Kaminer v. Canas, 282 Ga. 830, 653 S.E.2d 691 (2007), cert. denied, 553 U.S. 1065, 128 S. Ct. 2503, 171 L.E.2d 786 (2008).

Death following surgery. — When the last act of alleged negligence occurred on September 26, 2001, when a patient underwent surgery, and the patient died of the resulting complications in 2005, the statute of repose under O.C.G.A. § 9-3-71(b) barred any claims that were not filed by September 26, 2006. The statute of repose did not violate due process or equal protection; furthermore, the right to file the cause of action had accrued before the statute of repose barred filing the claim. Bush v. Sreeram, 298 Ga. App. 68, 679 S.E.2d 87 (2009).

Negligent care of elderly claims. — Daughter's claims against a nursing home for the negligent care of her mother were barred by the two-year statute of limitations, O.C.G.A. § 9-3-71(a), because the daughter was aware of her mother's frequent injuries at the nursing home over the years that she spent there. Dove v. Ty

Cobb Healthcare Sys., 305 Ga. App. 13, 699 S.E.2d 355 (2010).

Failure to diagnose kidney cancer. — Doctors were sued for malpractice due to the doctors' failure to diagnose a patient's kidney cancer, which metastasized and killed the patient. As the doctors had the burden of proof as to the doctor's statute of limitations defense, the doctors could not obtain summary judgment based on controverted opinion testimony as to when the patient's cancer metastasized. Cleaveland v. Gannon, 284 Ga. 376, 667 S.E.2d 366 (2008).

Failure to preserve sperm. — Couple's suit based on an infertility clinic's failure to preserve sperm was time-barred under O.C.G.A. § 9-3-71(a); the limitations period began running on the date all of the sperm was used, not on the date of discovery, and because the claim involved a decision as to whether to use a fertilization method that would not have used all of the sperm, the claim was for professional, not ordinary, negligence. Baskette v. Atlanta Ctr. for Reprod. Med., LLC, 285 Ga. App. 876, 648 S.E.2d 100 (2007), cert. denied, 2008 Ga. LEXIS 103 (Ga. 2008).

Under O.C.G.A. § 9-3-70, in a married couple's suit based on an infertility clinic's failure to preserve sperm, claims against two employees of the clinic were claims for professional negligence, not for ordinary negligence, and thus were time-barred under O.C.G.A. § 9-3-71(a); the employees were involved in the process of thawing and using the husband's sperm in order to fertilize the wife's eggs, and the employees performed these technical functions within the scope of their employment and under the supervision of licensed medical doctors. Baskette v. Atlanta Ctr. for Reprod. Med., LLC, 285 Ga. App. 876, 648 S.E.2d 100 (2007), cert. denied, 2008 Ga. LEXIS 103 (Ga. 2008).

Negligence and misdiagnosis claim time barred.

Medical malpractice suit was barred by the O.C.G.A. § 9-3-71(b) five year statute of repose because the alleged misdiagnosis and failure to treat the decedent's cardiovascular risk factors occurred more than seven years before the widow filed suit, and the new condition exception did not apply since the risk factors existed at the start of the treatment. Howell v. Zottoli, 302 Ga. App. 477, 691 S.E.2d 564 (2010).

Trial court properly struck, as time barred, the breach of fiduciary duty claim because the gravamen of that claim was the doctor's alleged failure to correctly read the patient's ultrasound and the failure to diagnose the patient's medical condition, amounting to a claim of negligence that went to the propriety of the doctor's exercise of medical skill and judgment, a medical malpractice claim as contemplated by O.C.G.A. §§ 9-3-70 and 9-3-71(b). Johnson v. Jones, 327 Ga. App. 371, 759 S.E.2d 252 (2014).

Dental malpractice. — Trial court erred by granting a dentist summary judgment in a dental malpractice suit as being filed outside the two-year limitations period because the court erred by ruling that the patient's consultation with an oral surgeon working with the dentist ended the tolling caused by the dentist's fraudulent concealment of the cause of action. MacDowell v. Gallant, 323 Ga. App. 61, 744 S.E.2d 836 (2013).

Appellate court properly reversed the grant of summary judgment to a dentist because the statutory period of limitation was tolled where the second dentist the patient consulted provided professional services to the patient jointly with the first. Gallant v. MacDowell, 295 Ga. 329, 759 S.E.2d 818 (2014).

RESEARCH REFERENCES

ALR. — Effect of fraudulent or negligent concealment of patient's cause of action on timeliness of action under medical malpractice statute of repose, 19 ALR6th 475.

9-3-72. Foreign objects left in body.

Law reviews. — For survey article on tort law, see 60 Mercer L. Rev. 375 (2008). For annual survey on torts, see 65 Mercer L. Rev. 265 (2013).

JUDICIAL DECISIONS

Applicability of § 9-3-71.

In a medical malpractice action, it is for a jury to determine whether a patient by exercising ordinary care should have learned on December 7, 2005, or on December 9, 2005, that a foreign object had been left in the patient's body during the performance of surgery in 2001 and the decision of the jury would govern whether the statute of limitations in O.C.G.A. § 9-3-71 or O.C.G.A. § 9-3-72 controlled. Monfort v. Colquitt County Hosp. Auth., 288 Ga. App. 202, 653 S.E.2d 535 (2007), cert. denied, 2008 Ga. LEXIS 225 (Ga. 2008).

Intentional or unintentional actions. — Georgia Court of Appeals has reinterpreted the exception under O.C.G.A. § 9-3-72 to the one-year limitation period in medical malpractice cases for foreign objects left in the body to apply whether the object was left intentionally or unintentionally; thus, a trial court erred in granting summary judgment to a dentist who left a cotton pellet in a patient's tooth as the claim was not time barred. Norred v. Teaver, 320 Ga. App. 508, 740 S.E.2d 251 (2013).

This section is a legislative adoption of doctrine of continuing tort.

By requiring in O.C.G.A. § 9-3-72 that a patient who claims a foreign object was negligently left in the patient's body must file an action within one year after the negligent act or omission is discovered, the Georgia General Assembly has adopted the continuing tort rule; therefore, based upon the plain language and the legislative intent of O.C.G.A. § 9-3-72, the Georgia Court of Appeals overrules both Pogue v. Goodman, 282 Ga. App. 385 (638 S.E.2d 824) (2006) and Shannon v. Thornton, 155 Ga. App. 670 (272 S.E.2d 535) (1980) as those cases improperly limit the statute's application. Norred v. Teaver, 320 Ga. App. 508, 740 S.E.2d 251 (2013).

Inadvertent leaving of object not requirement. — No language in O.C.G.A. § 9-3-72 limits the statute's application to only those foreign objects left inadvertently as such an interpretation of the statute would allow a defendant-doctor to unilaterally bar a plaintiff's claim, that has already fallen outside of the general limitation period, merely by asserting that the doctor left the foreign object in the patient's body intentionally, no matter how absurd the assertion. Norred v. Teaver, 320 Ga. App. 508, 740 S.E.2d 251 (2013).

RESEARCH REFERENCES

ALR. — Effect of fraudulent or negligent concealment of patient's cause of action on timeliness of action under medical malpractice statute of repose, 19 ALR6th 475.

9-3-73. Certain disabilities and exceptions applicable.

(a) Except as provided in this Code section, the disabilities and exceptions prescribed in Article 5 of this chapter in limiting actions on contracts shall be allowed and held applicable to actions, whether in tort or contract, for medical malpractice.

(b) Notwithstanding Article 5 of this chapter, all persons who are legally incompetent because of intellectual disability or mental illness

and all minors who have attained the age of five years shall be subject to the periods of limitation for actions for medical malpractice provided in this article. A minor who has not attained the age of five years shall have two years from the date of such minor's fifth birthday within which to bring a medical malpractice action if the cause of action arose before such minor attained the age of five years.

(c) Notwithstanding subsections (a) and (b) of this Code section, in no event may an action for medical malpractice be brought by or on behalf of:

(1) A person who is legally incompetent because of intellectual disability or mental illness more than five years after the date on which the negligent or wrongful act or omission occurred; or

(2) A minor:

(A) After the tenth birthday of the minor if such minor was under the age of five years on the date on which the negligent or wrongful act or omission occurred; or

(B) After five years from the date on which the negligent or wrongful act or omission occurred if such minor was age five or older on the date of such act or omission.

(d) Subsection (b) of this Code section is intended to create a statute of limitations and subsection (c) of this Code section is intended to create a statute of repose.

(e) The limitations of subsections (b) and (c) of this Code section shall not apply where a foreign object has been left in a patient's body. Such cases shall be governed by Code Section 9-3-72.

(f) The findings of the General Assembly under this Code section include, without limitation, that a reasonable relationship exists between the provisions, goals, and classifications of this Code section and the rational, legitimate state objectives of providing quality health care, assuring the availability of physicians, preventing the curtailment of medical services, stabilizing insurance and medical costs, preventing stale medical malpractice claims, and providing for the public safety, health, and welfare as a whole.

(g) No action which, prior to July 1, 1987, has been barred by provisions relating to limitations of actions shall be revived by this article, as amended. No action which would be barred before July 1, 1987, by the provisions of this article, as amended, but which would not be so barred by the provisions of this article and Article 5 of this chapter in force immediately prior to July 1, 1987, shall be barred until July 1, 1989. (Code 1933, § 3-1104, enacted by Ga. L. 1976, p. 1363, § 1; Ga. L. 1987, p. 887, § 2; Ga. L. 2015, p. 385, § 4-15/HB 252.)

The 2015 amendment, effective July 1, 2015, substituted "intellectual disability" for "mental retardation" in the first sentence of subsection (b) and in paragraph (c)(1).

Editor's notes. — Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'J. Calvin Hill, Jr., Act.'"

Law reviews. — For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010).

JUDICIAL DECISIONS

Constitutionality.

Provision of O.C.G.A. § 9-3-73(b) making tolling unavailable for legally incompetent persons in medical malpractice cases does not violate the equal protection clause, U.S. Const., amend. 14. The legislature had a rational basis for distinguishing between the legally incompetent and parties who are permitted tolling: foreign object plaintiffs, unrepresented estates, and contribution plaintiffs. Deen v. Egleston, 597 F.3d 1223 (11th Cir. 2010).

Construction with § 9-3-71. — In a medical malpractice action, because the trial court erroneously applied the five-year statute of repose contained in O.C.G.A. § 9-3-71(b), and not O.C.G.A. § 9-3-73, in finding that the parents' amended negligence complaint against certain doctors and nurses was time-barred, the trial court erred in entering summary judgment against the parents; further, the trial court also erred in finding that the doctors and nurses were rendering care to only the mother, and not the mother and the newborn child. Johnson v. Thompson, 286 Ga. App. 810, 650 S.E.2d 322 (2007), cert. denied, 2008 Ga. LEXIS 90 (Ga. 2008).

Legislative purpose. — When a patient and the patient's spouse filed a medical malpractice complaint, which the spouse amended after the patient's death to add a wrongful death claim, the wrongful death claim was not barred by the statute of repose as the wrongful death claim did not initiate legal proceedings, but was filed as an amendment to a pending suit that timely asserted other claims arising out of the same alleged malpractice; this result was consistent with the legislative purpose of the statute of repose set forth in O.C.G.A. § 9-3-73(f), as the original medical malpractice allegations had been brought less than two years after the alleged negligence, and the wrongful death claim was based on the same alleged acts and omissions as the earlier claims. Wesley Chapel Foot & Ankle Ctr., LLC v. Johnson, 286 Ga. App. 881, 650 S.E.2d 387 (2007), cert. denied, 2007 Ga. LEXIS 820 (Ga. 2007).

Wrongful death claim for intentional termination of patient's life support tolled due to infancy of patient's child. — Two year statute of limitations for wrongful death applied to a suit alleging tortious termination of life support of a parent and that limitations period was tolled based on the infancy of the parent's child, who was born to the parent prior to the defendant terminating the parent's life support. DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823 (2007), cert. denied, 2008 Ga. LEXIS 477 (Ga. 2008).

Applicability to statute of repose.

In a medical malpractice action, because the undisputed evidence showed that both the personal injury claims and a later-added wrongful death claim were timely filed, both in terms of O.C.G.A. § 9-3-71 and the relevant statute of repose, the doctors sued were properly denied summary judgment as to those claims. Moreover, construction of the medical malpractice statute of repose was consistent with the stated purposes of preventing stale medical malpractice claims in recognition of the fact that time eroded evidence, memories, and the availability of witnesses. Cleaveland v. Gannon, 288 Ga. App. 875, 655 S.E.2d 662 (2007), aff'd, 284 Ga. 376, 667 S.E.2d 366 (2008).

Cited in In re Carter, 288 Ga. App. 276, 653 S.E.2d 860 (2007).

RESEARCH REFERENCES

ALR. — When is person, other than one claiming posttraumatic stress syndrome or memory repression, within coverage of statutory provision tolling running of limitations period on basis of mental disability, 23 ALR6th 697.

ARTICLE 5

TOLLING OF LIMITATIONS

9-3-90. Individuals under disability or imprisoned when cause of action accrues.

(a) Individuals who are legally incompetent because of intellectual disability or mental illness, who are such when the cause of action accrues, shall be entitled to the same time after their disability is removed to bring an action as is prescribed for other persons.

(b) Except as otherwise provided in Code Section 9-3-33.1, individuals who are less than 18 years of age when a cause of action accrues shall be entitled to the same time after he or she reaches the age of 18 years to bring an action as is prescribed for other persons.

(c) No action accruing to an individual imprisoned at the time of its accrual which:

(1) Prior to July 1, 1984, has been barred by the provisions of this chapter shall be revived by this chapter, as amended; or

(2) Would be barred before July 1, 1984, by the provisions of this chapter, as amended, but which would not be so barred by the provisions of this chapter in force immediately prior to July 1, 1984, shall be barred until July 1, 1985. (Laws 1805, Cobb's 1851 Digest, p. 564; Laws 1806, Cobb's 1851 Digest, p. 565; Laws 1817, Cobb's 1851 Digest, p. 567; Ga. L. 1855-56, p. 233, § 19; Code 1863, § 2867; Code 1868, § 2875; Code 1873, § 2926; Code 1882, § 2926; Civil Code 1895, § 3779; Civil Code 1910, § 4374; Code 1933, § 3-801; Ga. L. 1984, p. 580, § 1; Ga. L. 2015, p. 385, § 4-15/HB 252; Ga. L. 2015, p. 675, § 2-3/SB 8; Ga. L. 2015, p. 689, § 3/HB 17.)

The 2015 amendments. — The first 2015 amendment, effective July 1, 2015, substituted "intellectual disability" for "mental retardation" in subsection (a). The second 2015 amendment, effective July 1, 2015, in subsection (a), substituted "Individuals" for "Minors and persons" at the beginning; added present subsection (b); redesignated former subsection (b) as subsection (c); in subsection (c), added the paragraph (1) and (2) designators; in the introductory language, substituted "an individual" for "a person" and substituted a colon for ", prior"; in paragraph (c)(1), inserted "Prior" at the beginning, deleted "relating to limitations of actions" following "of this chapter" near the middle, and substituted "; or" for ". No action accruing to a person imprisoned at the time of its accrual which would" at the end; and, in paragraph (c)(2), inserted "Would" at the beginning. The third 2015 amendment,

effective July 1, 2015, made identical changes as the second 2015 amendment.

Editor's notes. — Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'J. Calvin Hill, Jr., Act.'"

Ga. L. 2015, p. 675, § 1-1/SB 8, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Safe Harbor/Rachel's Law Act.'"

Ga. L. 2015, p. 675, § 1-2/SB 8, not codified by the General Assembly, provides that: "(a) The General Assembly finds that arresting, prosecuting, and incarcerating victimized children serves to retraumatize children and increases their feelings of low self-esteem, making the process of recovery more difficult. The General Assembly acknowledges that both federal and state laws recognize that sexually exploited children are the victims of crime and should be treated as victims. The General Assembly finds that sexually exploited children deserve the protection of child welfare services, including family support, crisis intervention, counseling, and emergency housing services. The General Assembly finds that it is necessary and appropriate to adopt uniform and reasonable assessments and regulations to help address the deleterious secondary effects, including but not limited to, prostitution and sexual exploitation of children, associated with adult entertainment establishments that allow the sale, possession, or consumption of alcohol on premises and that provide to their patrons performances and interaction involving various forms of nudity. The General Assembly finds that a correlation exists between adult live entertainment establishments and the sexual exploitation of children. The General Assembly finds that adult live entertainment establishments present a point of access for children to come into contact with individuals seeking to sexually exploit children. The General Assembly further finds that individuals seeking to exploit children utilize adult live entertainment establishments as a means of locating children for the purpose of sexual exploitation. The General Assembly acknowledges that many local governments in this state and in other states found deleterious secondary effects of adult entertainment establishments are exacerbated by the sale, possession, or consumption of alcohol in such establishments.

"(b) The purpose of this Act is to protect a child from further victimization after he or she is discovered to be a sexually exploited child by ensuring that a child protective response is in place in this state. The purpose and intended effect of this Act in imposing assessments and regulations on adult entertainment establishments is not to impose a restriction on the content or reasonable access to any materials or performances protected by the First Amendment of the United States Constitution or Article I, Section I, Paragraph V of the Constitution of this state."

Ga. L. 2015, p. 689, § 1/HB 17, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Hidden Predator Act.'"

Law reviews. — For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010). For note, "Taking a Toll on the Equities: Governing the Effect of the PLRA'S Exhaustion Requirements on State Statutes of Limitations," 47 Ga. L. Rev. 1321 (2013).

JUDICIAL DECISIONS

Analysis

General Provisions

Cited in In re Carter, 288 Ga. App. 276, 653 S.E.2d 860 (2007); Emory Healthcare, Inc. v. Pardue, 328 Ga. App. 664, 760 S.E.2d 674 (2014); Ga. Reg'l Transp. Auth. v. Foster, 329 Ga. App. 258, 764 S.E.2d 862 (2014).

Minors

Tolling of statute of limitations. — Two year statute of limitations for wrongful death applied to a suit alleging tortious termination of life support of a parent and that limitations period was tolled based on the infancy of the parent's child, who was born to the parent prior to the defendant terminating the parent's life support. DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823 (2007), cert. denied, 2008 Ga. LEXIS 477 (Ga. 2008).

Georgia Supreme Court upheld a $2.5 million wrongful death judgment because both the Court and the Georgia Court of Appeals have allowed other persons acting in a representative capacity to maintain a wrongful death action on behalf of a minor child when the surviving spouse declined to pursue the claim. Rai v. Reid, 294 Ga. 270, 751 S.E.2d 821 (2013).

Legal Incompetents

Tolling of statute of limitations. Tenant failed to show mental incapacity sufficient, under O.C.G.A. §§ 9-3-90(a) and 9-3-91, to toll the statute of limitations in O.C.G.A. § 9-3-33 because the tenant's own testimony indicated that, with the exception of a two-week period of hospitalization, the tenant was able to manage the ordinary affairs of life following a tragic sexual assault; accordingly, the landlord was entitled to summary judgment on the tenant's premises-liability action. Martin v. Herrington Mill, LP, 316 Ga. App. 696, 730 S.E.2d 164 (2012).

Prisoners

Tolling of statute of limitations. In a 42 U.S.C. § 1983 case in which a pro se inmate appealed a district court's adverse ruling on the inmate's deliberate indifference claim, that claim was untimely under O.C.G.A. § 9-3-33 and the inmate did not meet the standard in O.C.G.A. § 9-3-90(a) to toll the limitations period. Though the inmate undoubtedly had mental problems both before and after the assault in prison, under medication the inmate was able to manage the ordinary affairs of the inmate's life. Thompson v. Corr. Corp. of Am., No. 12-10421, 2012 U.S. App. LEXIS 12274 (11th Cir. June 18, 2012) (Unpublished).

RESEARCH REFERENCES

ALR. — When is person, other than one claiming posttraumatic stress syndrome or memory repression, within coverage of statutory provision tolling running of limitations period on basis of mental disability, 23 ALR6th 697.

9-3-91. Disabilities suffered after accrual of cause.

JUDICIAL DECISIONS

Toll due to mental incapacity not established. — Tenant failed to show mental incapacity sufficient, under O.C.G.A. §§ 9-3-90(a) and 9-3-91, to toll the statute of limitations in O.C.G.A. § 9-3-33 because the tenant's own testimony indicated that, with the exception of a two-week period of hospitalization, the tenant was able to manage the ordinary affairs of life following a tragic sexual assault; accordingly, the landlord was entitled to summary judgment on the tenant's premises-liability action. Martin v. Herrington Mill, LP, 316 Ga. App. 696, 730 S.E.2d 164 (2012).

Cited in DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823 (2007).

RESEARCH REFERENCES

ALR. — When is person, other than one claiming posttraumatic stress syndrome or memory repression, within coverage of statutory provision tolling running of limitations period on basis of mental disability, 23 ALR6th 697.

9-3-92. Five-year tolling for unrepresented estate — In favor of estate.

JUDICIAL DECISIONS

Construction with O.C.G.A. § 9-3-71(a). — Because the evidence presented on appeal adequately showed that the decedent estate's claim filed by the personal representative under O.C.G.A. § 51-4-5 was filed two months after the two-year statute of limitation under O.C.G.A. § 9-3-71(a) expired, despite the application of O.C.G.A. § 9-3-92, the trial court properly dismissed the claim as time-barred. Goodman v. Satilla Health Servs., 290 Ga. App. 6, 658 S.E.2d 792 (2008).

Difference in treatment with legally incompetent individuals. — Provision of O.C.G.A. § 9-3-73(b) making tolling unavailable for legally incompetent persons in medical malpractice cases does not violate the equal protection clause, U.S. Const., amend. 14. The legislature had a rational basis for distinguishing between the legally incompetent and parties who are permitted tolling: foreign object plaintiffs, unrepresented estates, and contribution plaintiffs. Deen v. Egleston, 597 F.3d 1223 (11th Cir. 2010).

Cited in Jensen v. Engler, 317 Ga. App. 879, 733 S.E.2d 52 (2012).

9-3-94. Removal of defendant from state.

JUDICIAL DECISIONS

Section applies only when service made impossible.

Tolling statute could not be applied to extend the statute of limitations in consolidated personal injury renewal actions because the fact that the driver against whom the actions were filed had moved to Maryland did not make it impossible to perfect service. Dickson v. Amick, 291 Ga. App. 557, 662 S.E.2d 333 (2008).

Cited in DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823 (2007).

9-3-95. Disability of one or more with joint right of action; effect of severability.

JUDICIAL DECISIONS

Cited in DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823 (2007).

9-3-96. Tolling of limitations for fraud of defendant.

Law reviews. — For annual survey on real property law, see 61 Mercer L. Rev. 301 (2009). For annual survey on zoning and land use law, see 61 Mercer L. Rev.

427 (2009). For annual survey on wills, trusts, guardianships, and fiduciary administration, see 66 Mercer L. Rev. 231 (2014).

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Statute tolled when no reason to investigate. — Statute of limitations was tolled under Georgia law with respect to commissions received by the debtor but not deposited when another shareholder had no reason to believe that the payments from a talent agency were continuing and no reason to believe that there was another account into which the money was being deposited. Hot Shot Kids Inc. v. Pervis (In re Pervis), 512 B.R. 348 (Bankr. N.D. Ga. 2014).

Fraud defense adequately pled. — Client adequately pled the client's fraud defense to a former employee benefits plan administrator's claim that the client's breach of contract claim was time-barred under the statute of limitation provided in the parties' agreement because in the consolidated pretrial order, which was signed by the trial judge and explicitly stated that it superseded the pleadings, the client asserted that the administrator falsely stated that there were no fund fees to be credited to the client, and the client provided details of the dates and contents of the administrator's alleged misrepresentations. Hewitt Assocs., LLC v. Rollins, Inc., 308 Ga. App. 848, 708 S.E.2d 697 (2011).

Tolling of statute when gravamen of action is fraud.

Trial court did not err by failing to rule that a client's breach of contract action against a former employee benefits plan administrator was time-barred because the evidence authorized the jury to find that the administrator committed fraud and that under O.C.G.A. § 9-3-96, the limitation period provided in the parties' agreement was tolled by the administrator's fraudulent conduct since the client presented evidence that it had a confidential relationship with the administrator that entitled it to "conclusively rely" on writings and other communications from the administrator. The evidence also authorized the jury to find that the administrator's fraud hindered the client from discovering its cause of action because there was evidence that a close scrutiny of the administrator's invoices would not have disclosed the cause of action. Hewitt Assocs., LLC v. Rollins, Inc., 308 Ga. App. 848, 708 S.E.2d 697 (2011).

Only actual fraud tolls statute of limitations.

Trial court did not err in concluding that there was no legal or factual basis to toll the statutes of limitation on the plaintiff's fraud claims asserted against the defendant, an investment advisory company, because the record was devoid of any evidence of any concealment or actual fraud on the part of the defendant which deterred or debarred the plaintiff from discovering the acts which were the basis of the action and which would have tolled the statute of limitation. Hamburger v. PFM Capital Mgmt., 286 Ga. App. 382, 649 S.E.2d 779 (2007).

Equitable estoppel.

County, the county health department, and builders were not equitably estopped from raising a defense based upon the expiration of the statutory repose period of O.C.G.A. § 9-3-51 in a purchaser's action alleging that they committed fraud because the purchaser failed to allege or to present evidence of any fraudulent act or statement to the purchaser by the county, department, or builders regarding the property's history of drainage problems, or the possible causes thereof, that occurred after the purchaser bought the property or of any fraud that prevented

General Consideration (Cont'd)

the purchaser from filing the cause of action. Wilhelm v. Houston County, 310 Ga. App. 506, 713 S.E.2d 660 (2011), cert. denied, 2012 Ga. LEXIS 219 (Ga. 2012).

Notice of information needed to determine truth. — Claims by limited partners in a real estate investment limited partnership that the general partners had breached the partners' fiduciary duty by making material misrepresentations and omissions about net sales proceeds for 13 years were time-barred under O.C.G.A. § 9-3-31; the first communication was in 1987, and the action had been brought more than four years after that date, and the limitation period was not tolled under O.C.G.A. § 9-3-96 because the limited partners had been on notice of the true contents of the partnership agreement the entire time and thus had always had proper notice of the information necessary to determine the truth. Hendry v. Wells, 286 Ga. App. 774, 650 S.E.2d 338 (2007), cert. denied, 2008 Ga. LEXIS 102 (Ga. 2008).

Cited in DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823 (2007); Effingham County v. Roach, 329 Ga. App. 805, 764 S.E.2d 600 (2014); S-D RIRA, LLC v. Outback Prop. Owners' Ass'n, 330 Ga. App. 442, 765 S.E.2d 498 (2014).

Fraud Defined

Fraud defense adequately pled. — Client adequately pled the client's fraud defense to a former employee benefits plan administrator's claim that the client's breach of contract claim was time-barred under the statute of limitation provided in the parties' agreement because in the consolidated pretrial order, which was signed by the trial judge and explicitly stated that it superseded the pleadings, the client asserted that the administrator falsely stated that there were no fund fees to be credited to the client, and the client provided details of the dates and contents of the administrator's alleged misrepresentations. Hewitt Assocs., LLC v. Rollins, Inc., 308 Ga. App. 848, 708 S.E.2d 697 (2011).

Relationship of Parties

Jury issue as to whether trustees fraudulently concealed breach of duty. — Because there were genuine issues as to whether the trustees fraudulently concealed their breach of fiduciary duty in selling the principal trust asset to a co-trustee at a discount through a straw man in 1979, tolling the statute of limitations, and whether the beneficiaries exercised diligence in discovering the fraud, summary judgment was improper. Smith v. SunTrust Bank, 325 Ga. App. 531, 754 S.E.2d 117 (2014).

Application

Due diligence required. — Townhome buyers' fraud and Interstate Land Sales Full Disclosure Act (ILSA) claims against a seller were barred by the four-year statute of limitations for fraud, O.C.G.A. § 9-3-31, and the three-year statute of limitations for ILSA violations, 15 U.S.C. § 1711; the buyers were on notice when the closing did not take place in 2003, and certainly when the closing did not occur by 2006, that something was wrong and should have discovered any alleged violations of ILSA. Allmond v. Young, 314 Ga. App. 230, 723 S.E.2d 691 (2012).

Certain of plaintiff's claims for fraud, conversion, and breach of oral contract arose outside of the four-year statute of limitation, and the undisputed facts showed that the plaintiff did not exercise reasonable diligence in discovering the defendant's alleged fraud as to a certain account as the defendant was put on notice of the account when the defendant received two personal checks issued from that account, endorsed and cashed the checks, but never inquired as to the checks' source. Hot Shot Kids Inc. v. Pervis (In re Pervis), 497 B.R. 612 (Bankr. N.D. Ga. 2013).

Court did not err in dismissing the tax advisor's claims as time-barred because the advisor filed the complaint long after the limitations periods governing the fraud, breach of fiduciary duty, and Georgia RICO claims expired, and the advisor had not plausibly alleged that the advisor exercised reasonable diligence in discover-

ing the causes of action and thus could not have invoked tolling because the advisor received direct information that conflicted with the bank entities' representation that the tax shelter transactions at issue had economic substance, the advisor did not explain how the advisor exercised reasonable diligence in light of that notice, and the advisor did not explain why the advisor could not have sued earlier. Klopfenstein v. Deutsche Bank Sec., Inc., No. 14-12611, 2014 U.S. App. LEXIS 22077 (11th Cir. Nov. 20, 2014) (Unpublished).

In a business dispute, the trial court properly granted summary judgment to the defendant because the evidence plainly showed that the plaintiff was aware of the alleged breach as early as 2008 and no later than November 2009, and thus the plaintiff had a duty to exercise reasonable diligence to discover the plaintiff's cause of action within the contractual one-year period of limitation set forth in the software development agreements. N4D, LLC v. Passmore, 329 Ga. App. 565, 765 S.E.2d 717 (2014).

Legal malpractice.

Client's legal malpractice claim was barred by the four-year statute of limitations and was not tolled by fraud pursuant to O.C.G.A. § 9-3-96 because the client learned of the client's action against the attorney within the limitations period but still did not file suit timely. There was no evidence that the attorney deterred the client from bringing the client's action, although the attorney erred in telling the client that the statute ran from the date the client's appeal was denied rather than from the date that the attorney filed the appeal improperly. Sowerby v. Doyal, 307 Ga. App. 6, 703 S.E.2d 326 (2010).

Disputes concerning material facts precluded summary judgment for defendants on the statute of limitations defense when in support of their tolling argument, the plaintiffs claimed that the defendants concealed the fact that defendants did not read the transaction documents, which would have alerted them to inaccuracies in the underlying assumptions of the tax opinion. Christenbury v. Locke Lord Bissell & Liddell, LLP, 2013 U.S. Dist. LEXIS 143648 (N.D. Ga. Aug. 22, 2013).

Concealment in doctor-patient relationship.

Evidence that a nurse-midwife, hospital, and medical practice deliberately misrepresented and withheld information concerning a baby's condition before and just after the baby's birth was sufficient to create a jury question as to whether they committed fraud sufficient to toll the statute of limitations and estop the application of the statute of repose, O.C.G.A. § 9-3-71(a), pursuant to O.C.G.A. § 9-3-96. Wilson v. Obstetrics & Gynecology of Atlanta, P.C., 304 Ga. App. 300, 696 S.E.2d 339 (2010).

Trial court did not err in granting a doctor's motion for judgment on the pleadings on the ground that a patient failed to file a medical malpractice complaint within the two-year period of limitation for medical malpractice claims pursuant to O.C.G.A. § 9-3-71(a) because the limitation period did not remain tolled due to the doctor's alleged fraudulent statements; the doctor's assertion that the doctor had not done anything wrong did not prevent the patient from asking any of the doctors that treated the patient over the next several months about what could have caused a needle to break in the patient's cheek. Pryce v. Rhodes, 316 Ga. App. 523, 729 S.E.2d 641 (2012).

Concealment by employer's physician. — Because it was undisputed that, in 1994, plaintiff former flight attendant knew defendant doctor was the medical review officer for the employer and that the doctor had received a lab report that the sample was unsuitable, and it was also undisputed that, in 1993, the doctor told the attendant there was a problem with the test and the attendant was fired 6 weeks later due to the test, the attendant knew, 7 years before filing suit, that the attendant had suffered an injury and that the doctor was involved; thus, there was insufficient evidence of fraudulent concealment for equitable tolling under O.C.G.A. § 9-3-96. Drake v. Whaley, No. 09-12687, 2009 U.S. App. LEXIS 26415 (11th Cir. Dec. 3, 2009).

Dental malpractice. — Appellate court properly reversed the grant of summary judgment to a dentist because the statutory period of limitation was tolled

Application (Cont'd)

where the second dentist the patient consulted provided professional services to the patient jointly with the first. Gallant v. MacDowell, 295 Ga. 329, 759 S.E.2d 818 (2014).

Disability insurance limitation period not tolled. — Trial court did not err in failing to find that the six-year statute of limitation contained in O.C.G.A. § 9-3-24 tolled under O.C.G.A. § 9-3-96 in a retirement plan participant's breach of contract action, which was related to the denial of the participant's claim for disability benefits, because the participant was aware of the facts that the participant contended gave rise to the participant's claim for disability benefits: the fact of the participant's disability, and the fact that the participant received a Social Security award; even if a hospital authority employees retirement plan had a duty to notify the participant when the participant became entitled to pursue a disability claim under the retirement plan. There was no evidence that the plan was aware that the participant had begun receiving Social Security benefits, thereby triggering the participant's eligibility for the disability benefits. Paschal v. Fulton-Dekalb Hosp. Auth. Emples. Ret. Plan, 305 Ga. App. 6, 699 S.E.2d 357 (2010).

Abuse of power of attorney in handling farm quotas. — In a dispute involving a family farm partnership, the trial court erred by granting summary judgment to the children/grandchildren as to the claim regarding the peanut and tobacco quotas and assignments because certain claims were not untimely since genuine issues of fact existed as to whether a son inappropriately used a power of attorney as to the quotas and assignments and the father/grandfather sought to recover damage to personalty. Godwin v. Mizpah Farms, LLLP, 330 Ga. App. 31, 766 S.E.2d 497 (2014).

Fraud action in real property transaction time barred. — Seller's fraud claim against buyers was time-barred because the evidence was undisputed that more than four years passed between when the seller became aware that two parcels had been conveyed to the buyers, not just one, as the seller believed. Serchion v. Capstone Partners, Inc., 298 Ga. App. 73, 679 S.E.2d 40 (2009), cert. denied, No. S09C1642, 2009 Ga. LEXIS 781 (Ga. 2009).

Borrower's fraud claim against lenders. — Plaintiff borrower's fraud claims against defendant lenders, in connection with an alleged long-term tax-favorable loan failed under O.C.G.A. § 9-3-31's four year statute of limitations because the limitations period began when the assumption agreement was signed but suit was not filed until almost six years later, and, at the very latest, if O.C.G.A. § 9-3-96 applied to toll the limitations period, the statute of limitations began to run nearly five years earlier when repayment was demanded only one year after the loan was made. Curtis Inv. Co., LLC v. Bayerische Hypo-Und Vereinsbank, AG, No. 08-14401, 2009 U.S. App. LEXIS 17469 (11th Cir. Aug. 5, 2009).

Fraud by former land manager. — Partnership's claims against its former managing partner with regard to a land deal and with regard to alleged mismanagement were not tolled by O.C.G.A. § 9-3-96; there was no evidence that the former partner concealed or failed to disclose information that deterred any partner from deciding if the partnership had claims arising from the purchase, and the partners were sophisticated business people who were put on notice of the former partner's alleged mismanagement as early as 1990. Cochran Mill Assocs. v. Stephens, 286 Ga. App. 241, 648 S.E.2d 764 (2007).

Failure to review legal bills. — Appellants' claims for alleged fraudulent billing for legal work billed before the date a fee award was approved by a federal district court were not tolled under O.C.G.A. § 9-3-96; it was error to hold that fees associated with appellate work were time-barred, however, as the evidence did not establish that the alleged fraud as to this work, which was not included in the bills submitted to the district court, occurred outside the limitation period as a matter of law. Falanga v. Kirschner & Venker, P.C., 286 Ga. App. 92, 648 S.E.2d 690 (2007).

Concealment by accounting firm. — In a negligent misrepresentation case wherein a trustee obtained a $10 million verdict against an accounting firm, the evidence authorized the jury to find that the firm's fraud prevented the trustees from discovering the trusts' cause of action until January 2002, despite reasonable diligence and, therefore, the claim was properly filed within four years after the beginning of the limitation period. PricewaterhouseCoopers, LLP v. Bassett, 293 Ga. App. 274, 666 S.E.2d 721 (2008).

Statute not applicable to notice of appeal in condemnation action. — O.C.G.A. § 32-3-14 sets forth a mandatory time period for filing an appeal in a condemnation action, not a statute of limitation for commencing a particular type of action; thus, O.C.G.A. § 9-3-96 did not apply to extend a property owner's time for filing an appeal. Moreover, the owner did not show that the Department of Transportation committed actual fraud involving moral turpitude or that the owner itself exercised reasonable diligence. Cedartown North P'ship, LLC v. Ga. DOT, 296 Ga. App. 54, 673 S.E.2d 562 (2009).

County did not prevent surviving spouse from pursuing action. — Trial court erred in denying a county's motion for summary judgment on the ground that the time for filing the ante litem notice had been tolled by the application of O.C.G.A. §§ 9-3-96 and 9-3-99 because the county was not a criminal defendant in a prior prosecution, and the county did not prevent a surviving spouse from learning that the spouse had a cause of action based upon an alleged police pursuit that could have contributed to the decedent spouse's death; the county was not prosecuted for any crime arising out of a collision involving a shoplifter and the car in which the decedent was a passenger, and the surviving spouse was aware of the facts that the spouse contended gave rise to the spouse's claims despite the county's alleged fraud. Columbia County v. Branton, 304 Ga. App. 149, 695 S.E.2d 674 (2010).

Equitable tolling disallowed in action concerning excessive notary fee. — In an action by borrowers claiming that the lender defrauded the borrowers by charging an excessive notary fee, the district court did not err in dismissing, on statute of limitations grounds, the fraud claim, which was brought more than five years after the borrowers signed the loan agreement because, even assuming the lender's conduct constituted actual fraud, Georgia's Supreme Court, in response to a certified question, declined to allow equitable tolling because the borrowers could have discovered the discrepancy between the notary fee statute and the actual fee charged at any time by simple reference to the notary fee statute. Anthony v. Am. Gen. Fin. Servs., 626 F.3d 1318 (11th Cir. 2010).

Statute of limitations not tolled in application of proceeds case. — Even assuming that a confidential relationship existed between the parties, it would not have tolled the statute of limitations on plaintiffs' claims under Georgia law because the plaintiffs were already aware as of at least November 2005 that the defendants did not plan to distribute the proceeds of a sale equally to the plaintiffs and the defendants, but instead planned to apply the proceeds to the preexisting debts of one of the plaintiffs' entities. HealthPrime, Inc. v. Smith/Packett/Med/Com, LLC, No. 11-10028, 2011 U.S. App. LEXIS 11324 (11th Cir. June 3, 2011) (Unpublished).

Fraud not shown. — Four-year statute of limitations applicable to accountant malpractice actions, O.C.G.A. § 9-3-25, was not tolled by fraud pursuant to O.C.G.A. § 9-3-96 because there was no evidence that the accountant concealed or failed to disclose information that deterred the client from filing suit within the limitation period; the accountant consistently and truthfully informed the client that the tax return was not complete. Bryant v. Golden, 302 Ga. App. 760, 691 S.E.2d 672 (2010).

Property owners' argument that a utility defrauded the owners by claiming that the utility had no easement and no plan to enter the owners' property again did not toll the owners' claims relating to the entry of the owners' property because the trespass was completed and would not recur, and no matter what, the utility

Application (Cont'd)

could not put back the trees and vegetation the utility had clear-cut, so the conversion was complete. There was no allegation, much less evidence, that the utility misled the owners as to a damages action. Daniel v. Amicalola Elec. Mbrshp. Corp., 289 Ga. 437, 711 S.E.2d 709 (2011).

Claim for pain and suffering was time barred under O.C.G.A. § 9-3-33 because O.C.G.A. § 9-3-96 failed to provide any tolling based on fraud since the very act of hiring a hit man to commit murder was not a separate and distinct fraud to support a finding of fraudulent concealment or actual fraud in and of itself in favor of the administrator of the victim's estate. Rai v. Reid, 294 Ga. 270, 751 S.E.2d 821 (2013).

9-3-98. Applicability of article.

JUDICIAL DECISIONS

Cited in DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823 (2007).

9-3-99. Tolling of limitations for tort actions while criminal prosecution is pending.

The running of the period of limitations with respect to any cause of action in tort that may be brought by the victim of an alleged crime which arises out of the facts and circumstances relating to the commission of such alleged crime committed in this state shall be tolled from the date of the commission of the alleged crime or the act giving rise to such action in tort until the prosecution of such crime or act has become final or otherwise terminated, provided that such time does not exceed six years, except as otherwise provided in Code Section 9-3-33.1. (Code 1981, § 9-3-99, enacted by Ga. L. 2005, p. 88, § 2/HB 172; Ga. L. 2015, p. 675, § 2-4/SB 8; Ga. L. 2015, p. 689, § 4/HB 17.)

The 2015 amendments. — The first 2015 amendment, effective July 1, 2015, added ", except as otherwise provided in Code Section 9-3-33.1" at the end of the Code section. The second 2015 amendment, effective July 1, 2015, made identical changes.

Editor's notes. — Ga. L. 2015, p. 675, § 1-1/SB 8, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Safe Harbor/Rachel's Law Act.'"

Ga. L. 2015, p. 675, § 1-2/SB 8, not codified by the General Assembly, provides that: "(a) The General Assembly finds that arresting, prosecuting, and incarcerating victimized children serves to retraumatize children and increases their feelings of low self-esteem, making the process of recovery more difficult. The General Assembly acknowledges that both federal and state laws recognize that sexually exploited children are the victims of crime and should be treated as victims. The General Assembly finds that sexually exploited children deserve the protection of child welfare services, including family support, crisis intervention, counseling, and emergency housing services. The General Assembly finds that it is necessary and appropriate to adopt uniform and reasonable assessments and regulations to help address the deleterious secondary effects, including but not limited to, prostitution and sexual exploitation of children, associated with adult entertainment establishments that allow the sale, possession, or consumption of alcohol on

premises and that provide to their patrons performances and interaction involving various forms of nudity. The General Assembly finds that a correlation exists between adult live entertainment establishments and the sexual exploitation of children. The General Assembly finds that adult live entertainment establishments present a point of access for children to come into contact with individuals seeking to sexually exploit children. The General Assembly further finds that individuals seeking to exploit children utilize adult live entertainment establishments as a means of locating children for the purpose of sexual exploitation. The General Assembly acknowledges that many local governments in this state and in other states found deleterious secondary effects of adult entertainment establishments are exacerbated by the sale, possession, or consumption of alcohol in such establishments.

"(b) The purpose of this Act is to protect a child from further victimization after he or she is discovered to be a sexually exploited child by ensuring that a child protective response is in place in this state. The purpose and intended effect of this Act in imposing assessments and regulations on adult entertainment establishments is not to impose a restriction on the content or reasonable access to any materials or performances protected by the First Amendment of the United States Constitution or Article I, Section I, Paragraph V of the Constitution of this state."

Ga. L. 2015, p. 689, § 1/HB 17, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Hidden Predator Act.'"

JUDICIAL DECISIONS

Applicability. — O.C.G.A. § 9-3-99 did not toll the two-year statute of limitation on the arrestees' complaint for false arrest, false imprisonment, negligent hiring and retention, assault and battery, and intentional infliction of emotional distress, which accrued on the date of the incident, because the arresting officer was not prosecuted for any crime arising out of the incident; the statute's plain language tolls the statute of limitation for any cause of action in tort brought "by the victim of an alleged crime" while the prosecution of the defendant is pending for a period not to exceed six years. Valades v. Uslu, 301 Ga. App. 885, 689 S.E.2d 338 (2009), cert. denied, No. S10C0803, 2010 Ga. LEXIS 519 (Ga. 2010).

Application was not retroactive. — As a vehicle passenger's claim was only two months old when the tolling provisions of O.C.G.A. § 9-3-99 became effective, and the passenger had not yet filed suit, § 9-3-99 was applicable to the action and there was no merit to a claim that it was retroactively applied in violation of Ga. Const. 1983, Art. I, Sec. I, Para. X. Beneke v. Parker, 293 Ga. App. 186, 667 S.E.2d 97 (2008), aff'd in part, rev'd in part, 285 Ga. 733, 684 S.E.2d 243 (2009).

Fine paid for traffic citation. — Couple had not shown that the statute of limitation on their personal injury claim against a second driver was tolled under O.C.G.A. § 9-3-99; the second driver, who had been cited for making an improper lane change, had paid the fine, and the couple had not provided any citation to the record to support their claim that the second driver remained subject to prosecution. McGhee v. Jones, 287 Ga. App. 345, 652 S.E.2d 163 (2007).

Tolling determination within province of jury. — Trial court erred when the court determined as a matter of law that the limitations period pursuant to O.C.G.A. § 9-3-33 in a personal injury action that arose from a vehicle collision was tolled pursuant to O.C.G.A. § 9-3-99 as the determination of whether a driver's act of following another vehicle too closely under O.C.G.A. § 40-6-49(a) was so extreme that it demonstrated intention or criminal negligence under O.C.G.A. § 16-2-1(b) for purposes of applying the tolling provision was within the province of the jury. Beneke v. Parker, 293 Ga. App. 186, 667 S.E.2d 97 (2008), aff'd in part, rev'd in part, 285 Ga. 733, 684 S.E.2d 243 (2009).

No criminal action so no tolling. — Trial court erred in denying a county's motion for summary judgment on the

ground that the time for filing the ante litem notice had been tolled by the application of O.C.G.A. §§ 9-3-96 and 9-3-99 because the county was not a criminal defendant in a prior prosecution, and the county did not prevent a surviving spouse from learning that the spouse had a cause of action based upon an alleged police pursuit that could have contributed to the decedent spouse's death; the county was not prosecuted for any crime arising out of a collision involving a shoplifter and the car in which the decedent was a passenger, and the surviving spouse was aware of the facts that the spouse contended gave rise to the spouse's claims despite the county's alleged fraud. Columbia County v. Branton, 304 Ga. App. 149, 695 S.E.2d 674 (2010).

Two-year statute of limitations for actions against the state, O.C.G.A. § 50-21-27(c), was not tolled under O.C.G.A. § 9-3-99 by a pending vehicle citation against the driver of the state's van because the survivor did not file suit against the driver, but only filed suit against the two state entities, neither of which was ever charged with any crime. Orr v. River Edge Cmty. Serv. Bd., 331 Ga. App. 228, 770 S.E.2d 308 (2015).

No criminal action against named defendant, so no tolling. — Trial court properly concluded that the tolling provision of O.C.G.A. § 9-3-99 did not apply to an employee's personal injury claims against a retailer because the retailer was not accused of any crime of which the employee was a victim, rather, a co-worker was indicted; therefore, the action against the retailer was barred by the two-year statute of limitation under O.C.G.A. § 9-3-33. Mays v. Target Corp., 322 Ga. App. 44, 743 S.E.2d 603 (2013).

Cited in DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823 (2007).

ARTICLE 6

REVIVAL

9-3-110. New promise to be in writing.

JUDICIAL DECISIONS

New promise must identify the debt.

Monthly wire transfer payments from a debtor to a creditor containing notations regarding the debtor's account constituted new promises by the debtor to pay under O.C.G.A. §§ 9-3-110 and 9-3-112 and sufficed to renew the running of the four-year statute of limitations, O.C.G.A. § 9-3-25. Because the last payment was made in July 2008, the creditor's suit in March 2012 was not time-barred. SKC, Inc. v. eMag Solutions, LLC, 326 Ga. App. 798, 755 S.E.2d 298 (2014).

Cited in Ogden v. Auto-Owners Ins. Co., 251 Ga. App. 723, 554 S.E.2d 575 (2001) (Unpublished).

9-3-112. Payment or written acknowledgment equivalent to new promise.

JUDICIAL DECISIONS

Monthly wire transfer with notation regarding account. — Monthly wire transfer payments from a debtor to a creditor containing notations regarding the debtor's account constituted new promises by the debtor to pay under O.C.G.A. §§ 9-3-110 and 9-3-112 and sufficed to renew the running of the four-year statute of limitations, O.C.G.A. § 9-3-25. Because the last payment was made in July 2008, the creditor's suit in March 2012 was not time-barred. SKC, Inc. v.

eMag Solutions, LLC, 326 Ga. App. 798, 755 S.E.2d 298 (2014).

Listing of time-barred claim in bankruptcy schedules. — Under Georgia law, a time-barred debt was not revived under O.C.G.A. § 9-3-112 by: (1) a debtor's listing of the time-barred claim in the debtor's schedules as undisputed and providing in the debtor's plan for the payment in full of allowed unsecured claims; and (2) the commencement of payments by the trustee to the holder of such claim under a confirmed plan. Hope v. Quantum3 Group LLC (In re Seltzer), 529 B.R. 385 (Bankr. M.D. Ga. 2015).

Scheduling of debts in compliance with Bankruptcy Code. — Debtor's scheduling of debts in compliance with the Bankruptcy Code is not the "unqualified admission" of liability required under Georgia law. Hope v. Quantum3 Group LLC (In re Seltzer), 529 B.R. 385 (Bankr. M.D. Ga. 2015).

CHAPTER 4

DECLARATORY JUDGMENTS

9-4-1. Purpose and construction of chapter.

Law reviews. — For survey article on administrative law, see 60 Mercer L. Rev. 1 (2008). For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010).

JUDICIAL DECISIONS

1. General Consideration

Limitations on declaratory judgments.

In a district attorney's declaratory judgment action seeking an order requiring magistrate judges to admit and consider hearsay evidence at preliminary hearings to determine whether to bind over a defendant for grand jury indictment, the trial court erred in finding that the court's declaration of law was subject to enforcement by a complaint to the Judicial Qualifications Commission (JQC) because the issue was not properly before the trial court, and the trial court's ruling regarding the JQC was merely advisory. Bethel v. Fleming, 310 Ga. App. 717, 713 S.E.2d 900 (2011).

Under the right-for-any-reason rule, the trial court did not err by dismissing a law firm's case against an insurer under the Declaratory Judgment Act, O.C.G.A. § 9-4-1, and O.C.G.A. § 15-19-14(b) to enforce its attorney's lien in a case the firm filed on behalf of an owner against the insurer because declaratory judgment was not available; the issues the firm raised were the same as those raised in an owner's case against the insurer for failure to provide a defense, and the rights of the parties in the owner's case had already accrued. McRae, Stegall, Peek, Harman, Smith & Manning, LLP v. Ga. Farm Bureau Mut. Ins. Co., 316 Ga. App. 526, 729 S.E.2d 649 (2012).

Cited in Fireman's Fund Ins. Co. v. Univ. of Ga. Ath. Ass'n, 288 Ga. App. 355, 654 S.E.2d 207 (2007); Sinclair v. Sinclair, 284 Ga. 500, 670 S.E.2d 59 (2008); Airport

1. General Consideration (Cont'd)

Auth. v. City of St. Marys, 297 Ga. App. 645, 678 S.E.2d 103 (2009); SJN Props., LLC v. Fulton County Bd. of Assessors, 296 Ga. 793, 770 S.E.2d 832 (2015).

2. Application

Declaratory judgment action not applicable to moot issue.

Superior court's judgment declaring that an agreement between a condominium association and a telecommunications company was subject to termination by the association pursuant to O.C.G.A. § 44-3-101 was vacated because the 12-month period of O.C.G.A. § 44-3-101(c) expired without the association having terminated any telecommunications contract, rendering the issue in its declaratory judgment action moot, and the declaratory judgment upon a moot issue was not authorized under the Declaratory Judgment Act, O.C.G.A. § 9-4-1 et seq.; by the time the superior court issued the declaratory judgment, the statutory period of O.C.G.A. § 44-3-101(c) had expired, and any right the association had to cancel and terminate contracts under that statute expired. Capitol Infrastructure, LLC v. Plaza Midtown Residential Condo. Ass'n, 306 Ga. App. 794, 702 S.E.2d 910 (2010).

Declaratory judgment was not appropriate in a derivative action by two property management entities against a managing member of a limited liability company because the entities did not seek guidance as to future actions, but instead sought a determination as to whether the managing member had already breached a contract. Pinnacle Benning, LLC v. Clark Realty Capital, LLC, 314 Ga. App. 609, 724 S.E.2d 894 (2012).

Trust beneficiary entitled to declaration of rights despite settlement agreement. — Both a settlement agreement between a trustee and several beneficiaries and the trial court's temporary restraining order maintained the status quo with regard to the personal contents of the beneficiaries' father's home and preserved the issue of one beneficiary's entitlement to the contents for a declaration of the parties' respective rights. Garner v. Redwine, 309 Ga. App. 158, 709 S.E.2d 569 (2011).

Judicial review of administrative decision.

Trial court properly dismissed a mortgagor's declaratory judgment counterclaim, which related to the purported conduct of the lender before the lender's failure, because the claim was not filed until after the Federal Deposit Insurance Corporation (FDIC) assumed control of the failed lender and, thus, constituted a post-receivership claim for which the mortgagor was required to exhaust administrative remedies before the FDIC prior to asserting the counterclaim against the lender. Bobick v. Cmty. & S. Bank, 321 Ga. App. 855, 743 S.E.2d 518 (2013).

Proper remedy in dispute over zoning ordinance. — In a declaratory judgment action brought by a county against a property owner, the trial court properly granted the county a declaratory judgment because there was a bona fide dispute over the applicability of the county's zoning ordinance and over whether the property owner had vested rights to use a petroleum gas tank on the property. Since the county was in a position of uncertainty as to the county's legal rights, a declaratory judgment was authorized. U. S. A. Gas, Inc. v. Whitfield County, 298 Ga. App. 851, 681 S.E.2d 658 (2009).

Involuntary dismissal must be without prejudice. — Involuntary dismissal of a declaratory-judgment action for want of justiciability does not operate as an adjudication on the merits and is instead an issue of subject-matter jurisdiction. Accordingly, dismissal must be without prejudice. Pinnacle Benning, LLC v. Clark Realty Capital, LLC, 314 Ga. App. 609, 724 S.E.2d 894 (2012).

RESEARCH REFERENCES

ALR. — What constitutes plain, speedy, and efficient state remedy under Tax Injunction Act (28 USCS § 1341), prohibiting federal district courts from interfering

with assessment, levy, or collection of state business taxes, 31 ALR Fed. 2d 237.

9-4-2. Declaratory judgments authorized; force and effect.

Law reviews. — For article, "Tracing Georgia's English Common Law Equity Jurisprudential Roots: Quia Timet," see 14 The Journal of Southern Legal History 135 (2006).

JUDICIAL DECISIONS

Analysis

General Consideration

Scope of section.

Because an actual and ongoing controversy existed regarding the rights of competing parties to a condominium unit, specifically the unit's owners and its buyer and disputes concerning ownership of or right of access to land were classic candidates for resolution via declaratory judgment, the trial court correctly denied the owners' motion for summary judgment on the buyer's counterclaim for declaratory judgment. Quality Foods, Inc. v. Smithberg, 288 Ga. App. 47, 653 S.E.2d 486 (2007), cert. denied, 2008 Ga. LEXIS 316 (Ga. 2008).

In a declaratory judgment action between a water utility and residents of a subdivision, given that the residents had standing to sue on a contract for the provision of water services as incidental beneficiaries, the trial court erred in finding that the utility was charging the appropriate rates thereunder; but, the utility was allowed to increase the utility's minimum annual fee and, given the clear and unambiguous language of the contract, enforce a restrictive covenant. Alday v. Decatur Consol. Water Servs., 289 Ga. App. 902, 658 S.E.2d 476 (2008).

No "actual controversy" shown.

Given the absence of a justiciable controversy, the trial court erred in granting a county industrial development authority's petition for declaratory judgment finding that the authority was immune from a county's zoning regulations as it amounted to an advisory opinion and had to be vacated and remanded for an order dismissing the petition without prejudice. Effingham County Bd. of Comm'rs v. Effingham County Indus. Dev. Auth., 286 Ga. App. 748, 650 S.E.2d 274 (2007).

As a city had the right under a lease and an airport authority's enabling legislation to relocate the airport against the authority's wishes, the authority did not face "uncertainty and insecurity" as to such an action. As the authority did not establish the existence of a justiciable controversy under O.C.G.A. § 9-4-2(a), the authority's declaratory judgment suit was properly dismissed. Airport Auth. v. City of St. Marys, 297 Ga. App. 645, 678 S.E.2d 103 (2009).

Trial court's holding that a bank was not required to confirm a second nonjudicial foreclosure sale under O.C.G.A. § 44-14-161 before pursuing an action for a deficiency judgment against a guarantor was an erroneous advisory opinion because the bank did file a confirmation petition and, thus, the parties failed to show under O.C.G.A. § 9-4-2(a) that there was any justiciable controversy on the issue of whether the bank was required to do so. Building Block Enterprises, LLC v. State Bank & Trust Company, 314 Ga. App. 147, 723 S.E.2d 467 (2012), cert. denied, No. S12C1053, 2012 Ga. LEXIS 553 (Ga. 2012).

Trial court erred in dismissing a coastal environmental center's claim for injunctive relief because the center alleged ultra

General Consideration (Cont'd)

vires conduct on the part of the Georgia Department of Natural Resources by the Department's issuance of letters of permission for activities that required a permit under the Shore Protection Act, O.C.G.A. § 12-5-237; thus, the center was authorized to bring suit under O.C.G.A. § 12-5-245 seeking injunctive relief, but the center's claim for declaratory relief was properly dismissed because no actual controversy existed since the center was complaining about prior letters issued, not any pending. Ctr. for a Sustainable Coast, Inc. v. Ga. Dep't of Natural Res., 319 Ga. App. 205, 734 S.E.2d 206 (2012).

Default judgment was properly entered, etc.

Trial court did not err in granting declaratory relief to an attorney via a default judgment because a petition for declaratory judgment was an action at law pursuant to O.C.G.A. § 9-4-2 and a petition for declaratory judgment was governed by the practice rules contained in the Civil Practice Act, specifically O.C.G.A. § 9-11-81, including the rules pertaining to default judgment; the attorney was entitled to a judgment that a doctor was not entitled to attorney fees from the doctor's former spouse under O.C.G.A. § 9-15-14(b) based on the admissions that the former spouse had successfully obtained a family violence protective order against the doctor and that this order was only vacated after the former spouse agreed to voluntarily dismiss the case. Vaughters v. Outlaw, 293 Ga. App. 620, 668 S.E.2d 13 (2008).

Appeal from declaratory judgment.

In a shareholder dispute between siblings, a trial court's declaratory judgment on one issue was directly appealable because it had the force and effect of a final judgment, notwithstanding that other issues and claims in the case remained pending before the trial court; accordingly, the appellate court had jurisdiction. Ward v. Ward, 322 Ga. App. 888, 747 S.E.2d 95 (2013).

Cited in Southern LNG, Inc. v. MacGinnitie, 294 Ga. 657, 755 S.E.2d 683 (2014); SJN Props., LLC v. Fulton County Bd. of Assessors, 296 Ga. 793, 770 S.E.2d 832 (2015).

Applicability to Specific Cases

1. Insurance Policies

Insurer not entitled to declaratory judgment.

On appeal from an order denying an insurer's motion to enforce a settlement agreement with an estate, and the insurer's petition for a declaratory judgment, the trial court did not clearly err in finding that: (1) absent an executed writing, a settlement agreement between the parties was never finalized; and (2) admissions that the negotiation between the estate's attorney and the insurer was restricted by the probate court's order, and evidence that the estate subsequently offered to assign the bad faith claim after the alleged settlement clearly showed that the estate never reached a final agreement with the insurer. In re Estate of Huff, 287 Ga. App. 614, 652 S.E.2d 203 (2007), cert. denied, 2008 Ga. LEXIS 223 (Ga. 2008).

Declaratory judgment to determine defense obligations.

Trial court properly granted summary judgment to an insured in its insurer's declaratory judgment action, requiring the insurer to defend and indemnify the insured in the underlying suit filed by a resident of the insured's personal care home arising from an attack by a fellow resident, as the incident occurred without the insured's foresight, expectation, or design, and was thus properly characterized as accidental under the terms of the insured's policy. Cincinnati Ins. Co. v. Magnolia Estates, Inc., 286 Ga. App. 183, 648 S.E.2d 498 (2007), cert. denied, 2008 Ga. LEXIS 88 (Ga. 2008).

Claims seeking declaratory judgment found moot. — Taxpayer's claims seeking declaratory judgment regarding a county commissioner's transaction by which property was sold to the county were properly found moot because the transaction had already concluded. Richardson v. Phillips, 302 Ga. App. 305, 690 S.E.2d 918 (2010).

Trial court properly dismissed residents' declaratory judgment action which asked the trial court to declare an election of the board of directors of a homeowners' association valid on the ground that the residents' claim was moot because the

residents failed to demonstrate that the residents were in need of guidance from the trial court to protect the residents from uncertainty regarding some future conduct; the residents sought to have the trial court validate a past event and, thus, the residents were not entitled to declaratory judgment, which would be nothing more than an advisory opinion from the trial court as to which party would succeed on the merits of any claim pertaining to the outcome of that election. Crittenton v. Southland Owners Ass'n, 312 Ga. App. 521, 718 S.E.2d 839 (2011).

Declaratory judgment upon moot issue not authorized. — Superior court's judgment declaring that an agreement between a condominium association and a telecommunications company was subject to termination by the association pursuant to O.C.G.A. § 44-3-101 was vacated because the 12-month period of O.C.G.A. § 44-3-101(c) expired without the association having terminated any telecommunications contract, rendering the issue in its declaratory judgment action moot, and the declaratory judgment upon a moot issue was not authorized under the Declaratory Judgment Act, O.C.G.A. § 9-4-1 et seq.; by the time the superior court issued the declaratory judgment, the statutory period of O.C.G.A. § 44-3-101(c) had expired, and any right the association had to cancel and terminate contracts under that statute expired. Capitol Infrastructure, LLC v. Plaza Midtown Residential Condo. Ass'n, 306 Ga. App. 794, 702 S.E.2d 910 (2010).

2. Miscellaneous

District attorney request for declaratory judgment on admissibility of hearsay evidence. — District attorney's declaratory judgment claim, which sought an order requiring magistrate judges to admit and consider hearsay evidence at preliminary hearings to determine whether to bind over a defendant for grand jury indictment, was proper as involving a justiciable controversy under O.C.G.A. § 9-4-2 because the magistrate court established a standard practice requiring the production of direct evidence in addition to hearsay evidence to support a bindover determination at a preliminary hearing; the result was uncertainty and insecurity in the district attorney as to the district attorney's office's burden of proof and production at future preliminary hearings. Bethel v. Fleming, 310 Ga. App. 717, 713 S.E.2d 900 (2011).

Supreme Court of Georgia reversed the judgment of the lower courts granting a district attorney a declaratory judgment because the district attorney did not have the right to bring a declaratory judgment action to obtain review of the probable cause decisions of magistrate judges at preliminary hearings or to challenge the admissibility of hearsay evidence at such hearings. Leitch v. Fleming, 291 Ga. 669, 732 S.E.2d 401 (2012).

No standing to seek declaration regarding physician participation in execution. — Physicians and a sociologist lacked standing to seek a declaration under O.C.G.A. § 9-4-2 that Georgia law prohibited physician participation in executions; the physicians in question had not participated or planned to participate in executions, only three of them practiced medicine in Georgia, and a medical board decision indicated that no physician who participated in an execution would be subject to disciplinary proceedings. Zitrin v. Ga. Composite State Bd. of Med. Examiners, 288 Ga. App. 295, 653 S.E.2d 758 (2007), cert. denied, 2008 Ga. LEXIS 285 (Ga. 2008).

Non-party could not challenge validity of agreement, but could seek a declaration of rights. — In a dispute between a back-up buyer and the buyer and sellers of real property, the back-up buyer had standing under O.C.G.A. § 9-4-2 to seek a declaration of its rights, if any, to the disputed property, although the back-up buyer was not a party to the contracts between the buyer and the sellers; however, the back-up buyer did not have standing to challenge the signatures on those contracts pursuant to O.C.G.A. § 9-2-20. Del Lago Ventures, Inc. v. QuikTrip Corp., 330 Ga. App. 138, 764 S.E.2d 595 (2014).

Land disturbance permits. — In a declaratory judgment action brought by a developer against a county seeking to invalidate an ordinance which required de-

Applicability to Specific Cases (Cont'd)
2. Miscellaneous (Cont'd)

nial of the developer's land disturbance permit based on two soil-related ordinance violations existing, the judgment in favor of the developer was upheld on appeal with regard to the developer's claim for damages under 42 U.S.C. § 1983, for alleged violations of the developer's equal protection rights in the county's enforcement of the ordinance. The trial court properly determined that the developer was not required to prove a valid property right with regard to the developer's equal protection challenge; the trial court properly awarded attorney fees to the developer under O.C.G.A. § 13-6-11 as the jury was authorized to award the attorney fees as an element of the damages the jury awarded on the developer's federal equal protection claim, regardless of whether the developer could prevail on any state law claim for damages; but the trial court erred by failing to address the merits of the developer's petition for a declaratory judgment since the overall enforceability of the ordinance, which was still the law, was not rendered moot by the withdrawal notice. Fulton County v. Legacy Inv. Group, LLC, 296 Ga. App. 822, 676 S.E.2d 388 (2009).

Employment agreements.

In a removed action seeking a declaration as to the enforceability of a non-compete provision, a corporation was not fraudulently joined as a plaintiff in order to avoid complete diversity, warranting a remand pursuant to 28 U.S.C. § 1447, because under O.C.G.A. § 9-4-2(b) state courts were authorized to entertain declaratory actions brought by any interested party whether or not further relief was or could have been prayed when the ends of justice required that the declaration should be made, and the court could not say with certainty that the corporation was not a real party in interest. Campbell v. Quixtar, Inc., No. 2:08-CV-0045-RWS, 2008 U.S. Dist. LEXIS 46507 (N.D. Ga. June 13, 2008).

Requirements for application of the declaratory judgment statute, O.C.G.A. § 9-4-2, were met in a case involving a new employer bringing suit against the former employer seeking a declaration as to the legal effect of the non-compete covenants between the former employer and the former employees, thus, the new employer had standing to seek a declaration as to the legal effect of the non-compete covenants in the employment agreements. Lapolla Indus. v. Hess, 325 Ga. App. 256, 750 S.E.2d 467 (2013).

In a declaratory judgment action seeking a declaration as to the enforceability of non-compete clauses in an employment contract, the trial court properly granted the competitor judgment on the pleadings because the court correctly found that the pleadings showed that the lack of any limit on the scope of the restricted work or the solicitation of former customers were void and unenforceable under the non-severability rule as a matter of law. Lapolla Indus. v. Hess, 325 Ga. App. 256, 750 S.E.2d 467 (2013).

Support obligations. — As a former spouse planned to continue denying the second former spouse's claim of back child support based on the first spouse's understanding of an unclear divorce decree's formula for calculating increases in the first spouse's support obligation, but doing so subjected the first spouse to contempt charges, the first spouse properly filed a declaratory judgment action under Georgia's Uniform Declaratory Judgments Act, O.C.G.A. § 9-4-1 et seq. Acevedo v. Kim, 284 Ga. 629, 669 S.E.2d 127 (2008).

Taxation.

Trial court erred by dismissing a city's declaratory judgment action against several online travel companies for lack of subject matter jurisdiction, and the appellate court erred by affirming the dismissal,as the issue of whether the city's ordinance allowing the city to collect a hotel occupancy tax from the online travel companies was a contested issue in the matter that neither lower court had determined. The legal question of whether the ordinance even applied to the online travel companies had to be determined before the city was required to submit to the administrative process set forth within the ordinance and the Enabling Statutes, O.C.G.A. § 48-13-50 et seq. City of Atlanta v. Hotels.com, L.P., 285 Ga. 231, 674 S.E.2d 898 (2009).

Trial court granted an impermissible advisory opinion when the court granted a second city's request for a declaratory judgment that the second city was authorized to impose and collect taxes on the sale, storage, and distribution of alcoholic beverages at an airport within that city's limits because the second city failed to show that there was any justiciable controversy; the first city conceded that, under Georgia's Alcoholic Beverages Code, O.C.G.A. § 3-8-1(e), only the second city was authorized to impose and collect taxes on the sale, storage, and distribution of alcoholic beverages at the airport within the city's limits and that the first city had to refund any alcoholic beverage taxes that the city received in error for the sale, storage, and distribution of alcohol in portions of the airport located within the corporate boundaries of the second city. City of Atlanta v. City of College Park, 311 Ga. App. 62, 715 S.E.2d 158 (2011).

Lack of actual controversy when city sued over sidewalks. — Plaintiffs sought a declaratory judgment stating that a city was prohibited from installing sidewalks. As the city never began construction of the sidewalks and asserted that the city had no plans to do so, there was no actual controversy within the meaning of O.C.G.A. § 9-4-2(a); therefore, the plaintiffs did not have standing to raise a claim under the Georgia Declaratory Judgment Act, O.C.G.A. Ch. 4, T. 9. Bailey v. City of Atlanta, 296 Ga. App. 679, 675 S.E.2d 564 (2009).

Beneficiary's challenge to will provision. — Pursuant to O.C.G.A. § 9-4-2(c), a beneficiary of a will who wished to remove the executor, and who contended that a will provision restricting the beneficiary's right to alienate a fee simple estate was invalid, could seek a declaratory judgment even if the beneficiary had other adequate legal or equitable remedies. Bandy v. Henderson, 284 Ga. 692, 670 S.E.2d 792 (2008).

Suit to compel release of medical records. — Surviving spouse sued a nursing home for wrongful death and sought a temporary restraining order and a permanent injunction requiring the home to release the decedent's medical records, as well as a judgment under O.C.G.A. § 9-4-2 declaring her legal entitlement to such records. As the spouse sought injunctive relief in a case involving an actual controversy, the suit was an appropriate case for a declaratory judgment. Alvista Healthcare Ctr., Inc. v. Miller, 296 Ga. App. 133, 673 S.E.2d 637 (2009).

Declaratory judgment not available in action to enforce attorney's lien. — Under the right-for-any-reason rule, the trial court did not err by dismissing a law firm's case against an insurer under the Declaratory Judgment Act, O.C.G.A. § 9-4-1, and O.C.G.A. § 15-19-14(b) to enforce the firm's attorney's lien in a case the firm filed on behalf of an owner against the insurer because declaratory judgment was not available; the issues the firm raised were the same as those raised in an owner's case against the insurer for failure to provide a defense, and the rights of the parties in the owner's case had already accrued. McRae, Stegall, Peek, Harman, Smith & Manning, LLP v. Ga. Farm Bureau Mut. Ins. Co., 316 Ga. App. 526, 729 S.E.2d 649 (2012).

9-4-3. Further relief; interlocutory extraordinary relief to preserve status quo.

JUDICIAL DECISIONS

Interlocutory injunction not appropriate. — Issuance of an interlocutory injunction would not have been appropriate to maintain the status quo pending a ruling on the merits that would never have occurred. Marietta Props. LLC v. City of Marietta, 319 Ga. App. 184, 732 S.E.2d 102 (2012).

Cited in Southern LNG, Inc. v. MacGinnitie, 294 Ga. 657, 755 S.E.2d 683 (2014).

9-4-4. Declaratory judgments involving fiduciaries.

(a) Without limiting the generality of Code Sections 9-4-2, 9-4-3, 9-4-5 through 9-4-7, and 9-4-9, any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, ward, next of kin, or beneficiary in the administration of a trust or of the estate of a decedent, a minor, a person who is legally incompetent because of mental illness or intellectual disability, or an insolvent may have a declaration of rights or legal relations in respect thereto and a declaratory judgment:

(1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others;

(2) To direct the executor, administrator, or trustee to do or abstain from doing any particular act in his fiduciary capacity; or

(3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

(b) The enumeration in subsection (a) of this Code section does not limit or restrict the exercise of general powers conferred in Code Section 9-4-2 in any proceeding covered thereby where declaratory relief is sought in which a judgment or decree will terminate the controversy or remove the uncertainty. (Ga. L. 1945, p. 137, §§ 7, 8; Ga. L. 2015, p. 385, § 4-15/HB 252.)

The 2015 amendment, effective July 1, 2015, substituted "intellectual disability" for "mental retardation" in the introductory language of subsection (a).

Editor's notes. — Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'J. Calvin Hill, Jr., Act.'"

JUDICIAL DECISIONS

Effect of in terrorem clause in will. — Appellant beneficiary was entitled to pursue a declaratory judgment action under O.C.G.A. § 9-4-4(a)(3) regarding an in terrorem clause in a will as uncertainty existed as to appellant's rights under the will to bring an action for removal of the executor; thus, the complaint did not seek an advisory opinion. Sinclair v. Sinclair, 284 Ga. 500, 670 S.E.2d 59 (2008).

Trust beneficiary entitled to declaration of rights despite settlement agreement. — Both a settlement agreement between a trustee and several beneficiaries and the trial court's temporary restraining order maintained the status quo with regard to the personal contents of the beneficiaries' father's home and preserved the issue of one beneficiary's entitlement to the contents for a declaration of the parties' respective rights. Garner v. Redwine, 309 Ga. App. 158, 709 S.E.2d 569 (2011).

9-4-5. Filing and service; time of trial; drawing of jury.

JUDICIAL DECISIONS

Cited in Vaughters v. Outlaw, 293 Ga. App. 620, 668 S.E.2d 13 (2008).

9-4-7. Only parties affected; when municipality made party; when Attorney General served and heard.

JUDICIAL DECISIONS

This section relates only to declaratory judgment proceedings.

Plaintiff's challenge to the offer of settlement statute's, O.C.G.A. § 9-11-68 (d), constitutionality arose from plaintiff's personal injury action and not from a declaratory judgment action; thus, the trial court erred in denying that challenge based on the plaintiff's failure to serve the Attorney General with notice. Buchan v. Hobby, 288 Ga. App. 478, 654 S.E.2d 444 (2007).

O.C.G.A. § 9-4-7(c) did not apply to a case because the property owners did not file a declaratory judgment action to have O.C.G.A. § 46-3-204 declared unconstitutional. The declaratory judgments sought by the owners and by the utility in the utility's counterclaim pertained to whether the utility had an easement on the owners' land, and § 46-3-204 was raised by the utility as a defense, to which the owners then asserted the unconstitutionality of § 46-3-204 as an argument against that defense. Daniel v. Amicalola Elec. Mbrshp. Corp., 289 Ga. 437, 711 S.E.2d 709 (2011).

Service on Attorney General is mandatory and jurisdictional, etc.

Jurisdiction existed because the Attorney General of Georgia had notice of the property owners' challenge to the constitutionality of O.C.G.A. § 46-3-204 five months before the trial court ruled, but the Attorney General made no attempt to be heard on the matter or in the case on appeal. Under these circumstances, it could not be said that the owners failed to sufficiently comply with O.C.G.A. § 9-7-4 (c), even assuming that the owners were required to do so. Daniel v. Amicalola Elec. Mbrshp. Corp., 289 Ga. 437, 711 S.E.2d 709 (2011).

Cited in Sentinel Offender Svcs., LLC v. Glover, No. S14A1271, S14X1272, 2014 Ga. LEXIS 940 (Nov. 24, 2014).

CHAPTER 5

INJUNCTIONS

9-5-1. For what purposes injunctions may be issued.

Law reviews. — For note, "The Ongoing Royalty: What Remedy Should a Patent Holder Receive When a Permanent Injunction Is Denied," see 43 Ga. L. Rev. 543 (2009).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Cited in Bishop v. Patton, 288 Ga. 600, 706 S.E.2d 634 (2011); Durham v. Durham, 291 Ga. 231, 728 S.E.2d 627 (2012).

Applicability to Specific Cases

1. Cases Where Injunction Proper

Breach of contract.

In a breach of contract action between an insurer and an agency, the trial court did not abuse the court's discretion in granting an interlocutory injunction to the agency as, after a balancing of the equities in the agency's favor, the record supported the finding that the insurer conducted itself, to the agency's detriment, as though arbitration of the dispute had been completed and it had been absolved from complying with its post-termination obligations under the underlying agency agreement between the parties. Cotton States Mut. Ins. Co. v. Stephen Brown Ins. Agency, Inc., 290 Ga. App. 660, 660 S.E.2d 445 (2008), cert. denied, No. S08C1321, 2008 Ga. LEXIS 687 (Ga. 2008).

Injunction against violation of ordinances. — Under proper circumstances, a county does have the power to seek an injunction enjoining the violation of the county's ordinances. Thus, the trial court properly granted a county a permanent injunction against a resident who violated property maintenance ordinances and health codes as the court found that criminal prosecutions would not adequately protect the county or be as practical and efficient to the ends of justice. Jacobs v. Chatham County, 295 Ga. App. 74, 670 S.E.2d 885 (2008).

Insufficient injury to property to allow injunction. — Because the parties agreed that the owner would retain ownership of a sewer line for a year, the city was properly enjoined from issuing any permits or other form of authorization that would allow a church to connect to the sewer infrastructure installed and paid for by the owner. City of Rincon v. Sean & Ashleigh, Inc., 284 Ga. 465, 667 S.E.2d 354 (2008).

Interference with easement.

In a dispute over a driveway easement between a landowner and a couple, the trial court properly granted the landowner an interlocutory injunction. Even if the landowner's deed did not incorporate by reference a plat that showed the easement, it was critical that the landowner's property could be accessed only through the easement, which gave rise to an easement by implication. Haygood v. Tilley, 295 Ga. App. 90, 670 S.E.2d 800 (2008), cert. denied, No. S09C0581, 2009 Ga. LEXIS 187 (Ga. 2009); cert. denied, 558 U.S. 1123, 130 S. Ct. 1077, 175 L. Ed. 2d 903 (2010).

County could seek injunction against city annexing property. — County's interest in the determination of the county's boundaries and the duties and obligations that naturally flow therefrom is present whether the basis for challenging a municipal annexation lies in procedural deficiencies or the more substantive lack of contiguity. Therefore, a county had standing to seek an interlocutory injunction preventing a city from annexing certain property. Cherokee County v. City of Holly Springs, 284 Ga. 298, 667 S.E.2d 78 (2008).

Interlocutory injunction.

No abuse in granting a second faction's motion for an interlocutory injunction to restrain the first faction from attempting to act on behalf of a Vietnamese Buddhist Temple, incorporated as a nonprofit Georgia corporation, or from holding themselves out as officers, directors, or agents of the Temple as: (1) the Temple's articles of incorporation clearly allowed it to have members; and (2) the court was authorized to find that all members of the Temple were given the requisite notice of the June, 2004 meeting, and that more than 50 percent of the members appeared at the meeting and voted unanimously to elect the second faction to the board. Nguyen v. Tran, 287 Ga. App. 888, 652 S.E.2d 881 (2007).

2. Cases Where Injunction Improper

Allocation of funds pursuant to a referendum. — A permanent injunction was unnecessary as actions of members of a county board of commissioners in entering into an amended intergovernmental agreement to allocate funds from a Special Local Option Sales Tax (SPLOST) referendum were not illegal or contrary to equity under O.C.G.A. § 9-5-1 as the new agreement accomplished the purpose of the resolution, just by a different means. Hicks v. Khoury, 283 Ga. 407, 658 S.E.2d 616 (2008).

Injunction not appropriate method for challenging agency order. — Trial court properly denied injunctive relief against a power company because an injunction was no longer an appropriate method for challenging an agency order after the passage of the Administrative Procedure Act, which provides a statutory right of review pursuant to O.C.G.A. § 50-13-19. Fulton County Taxpayers Found., Inc. v. Ga. PSC, 287 Ga. 876, 700 S.E.2d 554 (2010).

Misappropriation action under Georgia Trade Secrets Act. — Trial court manifestly abused the court's discretion when the court granted equitable relief to a limited liability company (LLC) because there was no finding that the drawings a company used were trade secrets as defined by the Georgia Trade Secrets Act (GTSA), O.C.G.A. § 10-1-761, and by using O.C.G.A. § 9-5-1 to provide the LLC the same relief based on the same allegations it would have received had the drawings qualified as trade secrets, the trial court undermined the exclusivity of the GTSA; the key inquiry was whether the same factual allegations of misappropriation were being used to obtain relief outside the GTSA, and since the trial court's award of general equitable relief under O.C.G.A. § 9-5-1 was based on the same conduct as the GTSA claim, i.e, the misappropriation of the drawings, such relief was preempted by O.C.G.A. § 10-1-767(a). Robbins v. Supermarket Equip. Sales, LLC, 290 Ga. 462, 722 S.E.2d 55 (2012).

RESEARCH REFERENCES

ALR. — What constitutes plain, speedy, and efficient state remedy under Tax Injunction Act (28 USCS § 1341), prohibiting federal district courts from interfering with assessment, levy, or collection of state business taxes, 31 ALR Fed. 2d 237.

9-5-2. No interference by equity in administration of criminal laws.

JUDICIAL DECISIONS

Defendant's unclean hands did not preclude speedy trial right. — Trial court erred to the extent that the trial court found that the defendant's unclean hands alone precluded the defendant's right to a speedy trial. Butler v. State, 309 Ga. App. 86, 709 S.E.2d 293 (2011).

Cited in Owens v. Hill, 295 Ga. 302, 758 S.E.2d 794 (2014); Sentinel Offender Services, LLC v. Glover, 296 Ga. 315, 766 S.E.2d 456 (2014).

9-5-6. Injunction against debtors not generally available to creditors.

JUDICIAL DECISIONS

Trial court's order directing that funds be transferred, etc.

An employer whose employee had opened a competing business and taken the employer's trade secrets and confidential information had an adequate and complete remedy at law because it could recover money damages from the employee if the employee removed funds from the employee's competing business that rightfully belonged to the employer. Therefore, under O.C.G.A. §§ 9-5-6 and 23-1-4, a trial court erred in requiring the employee to deposit the business's funds into the registry of the court. Coleman v. Retina Consultants, P.C., 286 Ga. 317, 687 S.E.2d 457 (2009).

Cited in Henry v. Beacham, 301 Ga. App. 160, 686 S.E.2d 892 (2009); Century Bank of Ga. v. Bank of Am., N.A., 286 Ga. 72, 685 S.E.2d 82 (2009).

9-5-7. When breach of contract for personal services enjoined.

JUDICIAL DECISIONS

Interlocutory injunction properly denied. — Trial court did not err in denying a motion filed by a funding member of limited liability companies (LLCs) for an interlocutory injunction to enjoin the manager of the LLCs for violating the member's exclusive right under operating agreements to manage apartment complexes because the member failed to show that there was not an adequate remedy at law; the motion for interlocutory injunction alleged a mere breach of a contract for personal services for which the manager could be liable in damages, and no action for either dissolution of the LLCs or appointment of a receiver had been filed, no action in regard to the parties' respective positions in the LLCs was filed until amendment of the complaint on the second day of the hearing, and the only financial damage the member alleged was the loss of funds to a corporation and the potential loss of collateral for the member's alleged security interest. Murphy v. McMaster, 285 Ga. 622, 680 S.E.2d 848 (2009).

9-5-8. Grant of injunctions in discretion of court; power to be exercised cautiously.

JUDICIAL DECISIONS

ANALYSIS

General Consideration.

Interlocutory injunction properly granted in service mark infringment suit. — In a suit alleging, inter alia, the infringement of state registered service marks, the trial court properly granted the plaintiff interlocutory relief because it was undisputed that the plaintiff was the last entity to hold the named pageants prior to the interlocutory injunction hearing, regardless of any issues of registration of service marks or abandonment or assignment by the defendant; thus, the status quo was the plaintiff being the host of the events using the marks.

India-American Cultural Ass'n v. iLink Professionals, Inc., 296 Ga. 668, 769 S.E.2d 905 (2015).

Requirement of notice. — Although other parties had filed summary judgment motions regarding the disputed ownership of equipment, no one had raised the issue of injunctive relief before the hearing, and another party, who did not participate in the hearing, could not be bound by an interlocutory injunction issued against that party without notice under O.C.G.A. § 9-11-65(a)(1). Abel & Sons Concrete, LLC v. Juhnke, 295 Ga. 150, 757 S.E.2d 869 (2014).

Discretion.

Discretion manifestly abused.

Court of appeals agreed with a former employee that the trial court abused the court's discretion in granting the former employer a permanent injunction after finding that a covenant not to compete entered into by the parties, approximately 18 months into the former employee's two-year contract, was binding on that employee as neither the employer's pre-existing duty to employ the employee for two years, nor the employee's continued employment, provided sufficient consideration for the agreement. Glisson v. Global Sec. Servs., 287 Ga. App. 640, 653 S.E.2d 85 (2007).

Absent any findings that the status quo was endangered or in need of preservation, and because an interlocutory injunction did not in fact preserve the status quo but forced a dog kennel owner to cease operations, the trial court abused the court's discretion in granting relief to an adjacent neighbor of the business, especially when that business had been in operation for several years without complaint. Green v. Waddleton, 288 Ga. App. 369, 654 S.E.2d 204 (2007).

Application.

Grant or deny temporary injunction.

Court did not abuse the court's discretion in entering an interlocutory injunction barring further disposition of the proceeds from joint bank accounts pending final disposition of the fraudulent transfer and wrongful death lawsuits because badges of fraud indicated an actual intent to hinder, delay, or defraud a decedent's estate and heirs of a full recovery. The transferor's adult child came up from Florida to withdraw the funds from joint bank accounts in Georgia three days after the transferor was arrested for the murder of the decedent. Bishop v. Patton, 288 Ga. 600, 706 S.E.2d 634, overruled on other grounds by SRB Inv. Servs., LLLP v. Branch Banking & Trust Co., 289 Ga. 1, 709 S.E.2d 267 (2011).

Trial court did not abuse the court's discretion, etc.

There was no abuse in denying an employer's motions for temporary and permanent injunctions to prevent its employee from violating a covenant not to compete, as the covenant contained restrictions that went further than necessary to achieve the employer's business interest, and unreasonably restricted the employee, as well as the public's right to choose the services the public preferred, which made the covenant overbroad and therefore unenforceable. Beacon Sec. Tech. v. Beasley, 286 Ga. App. 11, 648 S.E.2d 440 (2007).

No abuse in granting a second faction's motion for an interlocutory injunction to restrain the first faction from attempting to act on behalf of a Vietnamese Buddhist Temple, incorporated as a nonprofit Georgia corporation, or from holding themselves out as officers, directors, or agents of the Temple as: (1) the Temple's articles of incorporation clearly allowed it to have members; and (2) the court was authorized to find that all members of the Temple were given the requisite notice of the June 2004 meeting, and that more than 50 percent of the members appeared at the meeting and voted unanimously to elect the second faction to the board. Nguyen v. Tran, 287 Ga. App. 888, 652 S.E.2d 881 (2007).

In a breach of contract action between an insurer and an agency, the trial court did not abuse the court's discretion in granting an interlocutory injunction to the agency as, after a balancing of the equities in the agency's favor, the record supported the finding that the insurer conducted itself, to the agency's detri-

Application. (Cont'd)

ment, as though arbitration of the dispute had been completed and it had been absolved from complying with its post-termination obligations under the underlying agency agreement between the parties. Cotton States Mut. Ins. Co. v. Stephen Brown Ins. Agency, Inc., 290 Ga. App. 660, 660 S.E.2d 445 (2008), cert. denied, No. S08C1321, 2008 Ga. LEXIS 687 (Ga. 2008).

In a case in which a doctor appealed a trial court's grant of a medical practice's motion for a temporary injunction on the practice's claim that the doctor violated the non-competition provisions of the doctor's employment agreement with the group when the doctor left the group, the doctor unsuccessfully argued that the trial court erred in granting injunctive relief because the group had: (1) no legitimate business interest in enforcing the restrictive covenants; (2) released the doctor from the restrictive covenants; and (3) consented and requested that the doctor practice neurosurgery in violation of the restrictive covenants. The trial court did not abuse the court's discretion in finding that the equities weighed in favor of the group and that the status quo of not having competition by the doctor within the restricted area was preserved by the order. Pittman v. Coosa Med. Group, P.C., 300 Ga. App. 529, 685 S.E.2d 753 (2009).

Trial court did not manifestly abuse the court's discretion by entering a permanent injunction preventing a cemetery group from implementing a rule established by a private cemetery owner to prohibit the use of concrete vaults in its cemeteries. The rule violated the Georgia Cemetery and Funeral Services Act of 2000, O.C.G.A. § 10-14-1 et seq., because the rule was not reasonable within the context of O.C.G.A. § 10-14-16(b). Savannah Cemetery Group, Inc. v. DePue-Wilbert Vault Co., 307 Ga. App. 206, 704 S.E.2d 858 (2010).

Because the first two residential property owners presented testimonial and photographic evidence that the third property owner's act of pumping water from the pond to irrigate that owner's lawn lowered the water level, there was some evidence on which the trial court based the court's ruling prohibiting the third property owner from pumping water from the community pond, and the trial court did not abuse the court's discretion in issuing the injunction. Jones v. Morris, 325 Ga. App. 65, 752 S.E.2d 99 (2013).

Interlocutory injunction erroneously ordered. — On an appeal filed pursuant to O.C.G.A. § 5-6-34(a)(4) from an order enjoining a city from imposing a tax against a utility pursuant to an ordinance, the appeals court found that the interlocutory injunction was erroneously ordered, given that the ordinance had not yet posed any imminent danger to that utility's financial interest, but, only a demand for the tax had been issued. City of Willacoochee v. Satilla Rural Elec. Mbrshp. Corp., 283 Ga. 137, 657 S.E.2d 232 (2008).

Trial court erred, in part, by ordering an interlocutory injunction prohibiting a former employee from working in an executive capacity for a particular competitor of the former employer for one year based on the inevitable disclosure doctrine because a stand-alone claim under the doctrine, untethered from the provisions of Georgia's trade secret statute, O.C.G.A. § 10-1-760 et seq., was not cognizable in Georgia. Holton v. Physician Oncology Servs., LP, 292 Ga. 864, 742 S.E.2d 702 (2013).

Order denying interlocutory injunction held erroneous. — In a suit brought by a property owner seeking to specifically perform an oral agreement to purchase a strip of real estate, the trial court properly denied the property owner's request for an interlocutory judgment based on a violation of the statute of frauds and because another held a first right of refusal over the sale/purchase of the property. However, the trial court erred by concluding that the property owner had not obtained a parol license to use the strip since the property owner had made expenditures to improve the land and, as to the right of first refusal held by another, the grant of a parol license was not the equivalent to a sale of the property to have in anyway interfered with that right. Meinhardt v. Christianson, 289 Ga.

App. 238, 656 S.E.2d 568 (2008).

Trial court properly granted permanent injunction to enforce restrictive covenant. — Trial court properly issued a permanent injunction against a homeowner based on that homeowner's violation of a restrictive covenant by erecting a shed on the subject property because: (1) the shed was not constructed with the same material and color as the exterior of residence; (2) the structure clearly violated the covenant; and (3) enforcement of the covenant had not been waived. Glisson v. IRHA of Loganville, Inc., 289 Ga. App. 311, 656 S.E.2d 924 (2008).

Temporary restraining order granted when danger of dissipating assets.

Given evidence of a currency importer's ownership interest in the business assets and website managed by a contractor, and the contractor's threats to do harm to the website and the importer's business, under O.C.G.A. § 9-5-8, it was not an abuse of discretion to grant a preliminary injunction placing control of the assets in the importer. Grossi Consulting, LLC v. Sterling Currency Group, LLC, 290 Ga. 386, 722 S.E.2d 44 (2012).

Dissolving temporary restraining order to allow bank foreclosure proceeding. — Trial court did not abuse the court's discretion by dissolving a temporary restraining order and allowing a bank to proceed with the bank's foreclosure action as it was within the trial court's discretion to condition the extension of injunctive relief upon the mortgagor's placement of an amount of money in escrow reflecting past-due payments on the mortgage, which the mortgagor declined to do. Morgan v. U. S. Bank Nat'l Ass'n, 322 Ga. App. 357, 745 S.E.2d 290 (2013).

Interlocutory injunction improper. — It was error to grant a shopping mall's motion for an interlocutory injunction requiring a tenant to move to another location within the premises. The mall did not show that the status quo was endangered and in need of preservation, and indeed, the injunction did not preserve the status quo as the injunction required the tenant to vacate the tenant's current space and relocate to a smaller one; furthermore, the trial court failed to give proper consideration to the equities of the parties as there was no evidence of vital necessity or that the mall would suffer irreparable harm if the trial court denied the court's motion. Hipster, Inc. v. Augusta Mall P'ship, 291 Ga. App. 273, 661 S.E.2d 652 (2008).

Injunction preventing annexation of property proper. — When a county sought an interlocutory injunction preventing a city from annexing certain property, the trial court properly denied injunctive relief. The parties presented conflicting evidence regarding both the threat of harm to the county and the validity of the challenged annexation applications. Cherokee County v. City of Holly Springs, 284 Ga. 298, 667 S.E.2d 78 (2008).

Cited in Madonna v. Satilla Health Servs., 290 Ga. App. 148, 658 S.E.2d 858 (2008); Crossing Park Props., LLC v. Archer Capital Fund, LP, 311 Ga. App. 177, 715 S.E.2d 444 (2011); Sentinel Offender Services, LLC v. Glover, 296 Ga. 315, 766 S.E.2d 456 (2014).

9-5-9. Second injunction in court's discretion.

JUDICIAL DECISIONS

Second injunction after denial of first generally only proper when new facts shown.

Denial of an interlocutory injunction does not preclude a party from filing another request later if new evidence becomes available or the circumstances change such that there is a greater need for preliminary relief. Bishop v. Patton, 288 Ga. 600, 706 S.E.2d 634, overruled on other grounds by SRB Inv. Servs., LLLP v. Branch Banking & Trust Co., 289 Ga. 1, 709 S.E.2d 267 (2011).

9-5-10. Perpetual injunction after hearing.

JUDICIAL DECISIONS

Cited in Bishop v. Patton, 288 Ga. 600, 706 S.E.2d 634 (2011).

9-5-11. Injunctions against certain transactions outside state.

JUDICIAL DECISIONS

Fraudulent concealment of debtor's assets.

Court did not abuse the court's discretion in entering an interlocutory injunction barring further disposition of the proceeds from joint bank accounts pending final disposition of fraudulent transfer and wrongful death lawsuits because badges of fraud indicated an actual intent to hinder, delay, or defraud a decedent's estate and heirs of a full recovery. The transferor's adult child came up from Florida to withdraw the funds from joint bank accounts in Georgia three days after the transferor was arrested for the murder of the decedent. Bishop v. Patton, 288 Ga. 600, 706 S.E.2d 634, overruled on other grounds by SRB Inv. Servs., LLLP v. Branch Banking & Trust Co., 289 Ga. 1, 709 S.E.2d 267 (2011).

Trial court did not abuse the court's discretion by safeguarding the status quo pending final resolution of the creditor's fraudulent transfer claims against the debtors because the evidence supported a finding that the debtors had moved virtually all of the debtors' assets to a series of recently formed entities and other recipients with actual intent to hinder, delay, or defraud creditors and were likely to continue doing so in violation of the Georgia Uniform Fraudulent Transfers Act, O.C.G.A. § 18-2-74(a)(1); the purpose of the interlocutory injunction was to freeze the fraudulently transferred assets in place and prevent the debtors from putting the debtors' assets beyond the trial court's reach to satisfy an eventual judgment, thereby leaving the creditor practically remediless. SRB Inv. Servs., LLLP v. Branch Banking & Trust Co., 289 Ga. 1, 709 S.E.2d 267 (2011).

Trial court did not abuse the court's discretion in entering an interlocutory injunction to preserve the status quo pending adjudication of the merits of the creditor's action against the debtors alleging breach of contract and fraudulent transfers in violation of the Georgia Uniform Fraudulent Transfers Act, O.C.G.A. § 18-2-70 et seq., because the debtors presented no evidence of harm from the creditor's delay in amending the creditor's complaint to seek an interlocutory injunction, and the delay resulted primarily from the debtors' concealment of the debtors' actions and obstruction of the creditor's efforts to discover the details; vague assertions of harm supported by no citation to evidence in the record are insufficient to sustain a defense of laches, and there is a balance between a plaintiff's knowing that a cause of action exists and that interim injunctive relief may be needed and sitting on the plaintiff's rights to the prejudice of the defendant. SRB Inv. Servs., LLLP v. Branch Banking & Trust Co., 289 Ga. 1, 709 S.E.2d 267 (2011).

CHAPTER 6

EXTRAORDINARY WRITS

Article 2
Mandamus

Article 3
Prohibition

ARTICLE 2

MANDAMUS

9-6-20. When mandamus may issue.

All official duties should be faithfully performed, and whenever, from any cause, a defect of legal justice would ensue from a failure to perform or from improper performance, the writ of mandamus may issue to compel a due performance if there is no other specific legal remedy for the legal rights; provided, however, that no writ of mandamus to compel the removal of a judge shall issue where no motion to recuse has been filed, if such motion is available, or where a motion to recuse has been denied after assignment to a separate judge for hearing. (Orig. Code 1863, § 3130; Code 1868, § 3142; Code 1873, § 3198; Code 1882, § 3198; Civil Code 1895, § 4867; Civil Code 1910, § 5440; Code 1933, § 64-101; Ga. L. 2009, p. 643, § 1/HB 221.)

The 2009 amendment, effective July 1, 2009, substituted a comma for a semicolon near the beginning, deleted a comma following "performance" in the middle, and added the proviso at the end.

JUDICIAL DECISIONS

Analysis

General Consideration

Civil rights action. — Federal district court did not err in concluding that university professor's procedural due process claim was actionable under 42 U.S.C. § 1983 because the district court reached the plausible conclusion that the state courts may have summarily dismissed the professor's mandamus request without considering the merits thereof; while a writ of certiorari was not available to the

General Consideration (Cont'd)

professor upon the state court's determination that the termination proceedings were purely administrative, the professor was still entitled to seek a writ of mandamus. Laskar v. Peterson, 771 F.3d 1291 (11th Cir. 2014).

Effect of mandamus petition on limitations periods. — Inmate's federal habeas corpus petition, which was filed more than 365 days after the parole revocation the inmate was challenging, was time barred, and the inmate's earlier filing of a mandamus action under O.C.G.A. § 9-6-20 did not toll the federal limitations period because the mandamus petition, in which the inmate sought certain documents, was not a petition for collateral review that tolled the federal limitations period. Hawes v. Howerton, No. 1:05-CV-0683-BBM, 2006 U.S. Dist. LEXIS 97139 (N.D. Ga. July 6, 2006).

Elements of prima facie case.

In a taxpayer suit against a county and officials (the county), the court upheld the grant of summary judgment to the county because the taxpayer's mandamus claims failed for the simple reason that the taxpayer adduced no evidence that any actual assessment of any particular property was other than at fair market value or that the county had failed to comply with the county's legal duty to see that all taxable property within the county is assessed and returned for taxes at the property's fair market value. SJN Props., LLC v. Fulton County Bd. of Assessors, 296 Ga. 793, 770 S.E.2d 832 (2015).

Dismissal of inmate's mandamus action was error. — Trial court erred in dismissing an inmate's mandamus action pursuant to O.C.G.A. § 9-6-20, in which the defendant sought additional jail time credit, upon the inmate's failure to appear at a hearing in the matter, as the trial court failed to rule on the inmate's motion for habeas corpus ad testificandum under former O.C.G.A. § 24-10-62 (see now O.C.G.A. § 24-13-62) and, accordingly, the inmate had no ability to appear in court on the hearing date. Rozar v. Donald, 280 Ga. 111, 622 S.E.2d 850 (2005).

Petition for mandamus erroneously denied. — The trial court erroneously dismissed a litigant's petition for a writ of mandamus, and erroneously relied on dicta, in finding that orders setting a pre-trial conference in the underlying medical malpractice action were merely "housekeeping or administrative orders" that did not suspend the running of the five-year period under O.C.G.A. §§ 9-2-60(b) and 9-11-41(e). Instead, such orders tolled the running of the five-year rule if the orders were in writing, signed by the trial judge, and properly entered in the records of the trial court. Zepp v. Brannen, 283 Ga. 395, 658 S.E.2d 567 (2008).

Relief fashioned by court did not constitute mandamus. — Trial court simply granted summary judgment in favor of sign companies based on the court's finding that there were no valid ordinances regulating the construction of billboards at the time the applications by sign companies were filed and the sign companies were entitled to construct, maintain, and operate all signs for which the companies submitted applications and brought an action. The remedy fashioned by the trial court did not constitute mandamus relief because despite the cities' contrary arguments, the order did not compel the county or the cities to issue a permit as no permit was required at the time the applications were filed. Fulton County v. Action Outdoor Adver., JV, LLC, 289 Ga. 347, 711 S.E.2d 682 (2011).

Mandatory injunction was not mandamus. — Mere fact that a court order is mandatory, rather than prohibitive, does not transform injunctive relief into a writ of mandamus and an injunction is not void merely because the injunction is mandatory in nature. Moreover, a trial court may issue a mandatory injunction when mandamus relief is not available. Rigby v. Boatright, 330 Ga. App. 181, 767 S.E.2d 783 (2014).

Applicability to Specific Cases

1. Cases Where Mandamus Proper

Mandamus to require governmental body to hold hearing. — Because the firefighter did not have a hearing, the firefighter was correct that the firefighter did not have a right to a writ of certiorari,

O.C.G.A. § 5-4-1(a); however, pursuant to Georgia law, when no other specific legal remedy was available and a party had a clear right to have a certain act performed, a party could seek mandamus, O.C.G.A. § 9-6-20. Under Georgia law, this procedure could be used to compel a governmental body to act in compliance with the law, for instance to require a governmental board to hold a hearing as provided by law. East v. Clayton County, No. 10-15749, 2011 U.S. App. LEXIS 15925 (11th Cir. Aug. 1, 2011) (Unpublished).

Mandamus action challenging county board's decision abandoning road. — In a mandamus action, a trial court erred by reversing a decision of a county board of commissioners to abandon a road as the trial court failed to give proper deference to the board's decision to abandon the road and substituted the court's own judgment for that of the board. Scarborough v. Hunter, 293 Ga. 431, 746 S.E.2d 119 (2013).

Mandamus proper to correct procedural deprivation.

Teacher's claim that the teacher was denied procedural due process when the Georgia Professional Standards Commission refused to consider the teacher's appeal of a disciplinary action that was taken against the teacher failed because the teacher had a remedy available under O.C.G.A. § 9-6-20 in the form of a writ of mandamus. Wilbourne v. Forsyth County Sch. Dist., No. 08-12094, 2009 U.S. App. LEXIS 100 (11th Cir. Jan. 5, 2009) (Unpublished).

Former tenured teacher failed to state a claim of a procedural due process violation under 42 U.S.C. § 1983 in the nonrenewal of a teaching contract because the teacher failed to utilize available state remedies under O.C.G.A. §§ 9-6-20, 20-2-940, 20-2-942(b), and 20-2-1160(a) through petitioning the board of education for a hearing or seeking mandamus relief. Mason v. Clayton County Bd. of Educ., No. 08-16131, 2009 U.S. App. LEXIS 10491 (11th Cir. May 19, 2009) (Unpublished).

Former college student failed to state a procedural due process claim based on denial of a post-deprivation hearing following the student's suspension as the student had an adequate post-deprivation remedy; mandamus under O.C.G.A. § 9-6-20 was an available state remedy. Wells v. Columbus Tech. College, No. 12-13272, 2013 U.S. App. LEXIS 4022 (11th Cir. Feb. 27, 2013) (Unpublished).

Mandamus is proper remedy for failure of public defender's office to appoint appellate counsel. — A trial court properly held that the court did not have authority to appoint appellate counsel for a defendant because, under the Georgia Indigent Defense Act of 2003, a defendant was required to direct a request for indigent representation directly to the public defender's office. It appeared that the defendant, who had been sentenced to prison, would be eligible under O.C.G.A. § 17-12-23; although the defendant claimed that the public defender's office would not heed the defendant's requests, the defendant was not without a remedy as the defendant could apply for a writ of mandamus under O.C.G.A. § 9-6-20. Bynum v. State, 289 Ga. App. 636, 658 S.E.2d 196 (2008).

2. Cases Where Mandamus Improper

Mandamus relief properly denied since certification of appeals obtained. — Trial court did not err by denying a group of property owners their request for mandamus relief in the nature of finding that the county board of tax assessors certified their property tax appeals because it was undisputed that the tax appeals were physically delivered to the trial court and that it had ruled that such appeals were certified to it; thus, the property owners received the relief sought regarding certification. Newton Timber Co., L.L.L.P. v. Monroe County Bd. of Tax Assessors, 755 S.E.2d 770 (2014).

Mandamus inappropriate to compel spending of referendum funds. — Mandamus was not appropriate under O.C.G.A. § 9-6-20 as members of a county board of commissioners did not fail to perform their official duties by entering into a 2006 intergovernmental agreement to have $12 million raised by a 1999 Special Local Option Sales Tax (SPLOST) referendum used to upgrade and build two local waste water facilities as the SPLOST funds were insufficient to upgrade the

Applicability to Specific Cases (Cont'd)
2. Cases Where Mandamus Improper (Cont'd)

county's existing centralized system of waste water treatment; the 2006 intergovernmental agreement utilized the funds for the purposes specified in the 1999 resolution under O.C.G.A. § 48-8-121(a)(1), just by a different means. Hicks v. Khoury, 283 Ga. 407, 658 S.E.2d 616 (2008).

Mandamus unavailable to require school board to place citizen on agenda. — A citizen was not entitled to a writ of mandamus directing a school board to place the citizen on the board's agenda because setting the agenda was a discretionary act that was not subject to mandamus and none of the statutes cited by the citizen, O.C.G.A. §§ 20-2-1160(a), 45-10-1, and 50-6-6(b), imposed a duty on the board to place the citizen on the board's agenda. James v. Montgomery County Bd. of Educ., 283 Ga. 517, 661 S.E.2d 535 (2008).

Trial court did not err in denying the plaintiff's request for a mandamus nisi because the plaintiff's request for mandamus was unsupportable as a matter of law as it was undisputed that the county board of tax assessors provided various documents in response to the plaintiff's information requests regarding property tax assessments, and the plaintiff's demands for supplementation of the responses and an explanation of those responses in a recorded meeting session strayed far beyond what was required by statute. Hansen v. DeKalb County Board of Tax Assessors, 295 Ga. 385, 761 S.E.2d 35 (2014).

Mandamus unavailable for nominee seeking to serve on electric membership corporations. — Trial court erred by granting a nominee's writ of mandamus because under O.C.G.A. § 9-6-23, mandamus did not lie to enforce purely private contract rights and the nominee's efforts to be qualified as a person to sit on the board of an electric membership corporation was a private right as board members were not public officers within the meaning of O.C.G.A. § 9-6-20. Rigby v. Boatright, 294 Ga. 253, 751 S.E.2d 851 (2013).

Mandamus not appropriate if state revenue commissioner could be made party to county tax appeal. — In a gas company's suit against the state revenue commissioner for mandamus compelling the commissioner to accept its property tax returns under O.C.G.A. §§ 48-1-2(21) and 48-5-511(a), remand was proper to determine if the company had an acceptable alternative remedy in its pending county tax appeals under O.C.G.A. § 48-5-311, as required by O.C.G.A. § 9-6-20, if the commissioner could be made a party to those appeals by joinder or some other procedure. Southern LNG, Inc. v. MacGinnitie, 294 Ga. 657, 755 S.E.2d 683 (2014).

Mandamus not available to compel county to pay personal injury judgment. — Writ of mandamus to compel a county to pay the entire judgment entered against a former employee was properly denied as the underlying accident claim was covered by the county's self-insurance plan; Fulton County, Ga., Code of Resolutions § 102-81(e) excluded the claim from those the county was required to pay in full, and the county was responsible only for the amount of the self-insurance limits. Thomason v. Fulton County, 284 Ga. 49, 663 S.E.2d 216 (2008).

Motion to recuse judge. — Because an affidavit in support of a judge's recusal was insufficient on its face, and the proper remedy for challenging the denial of a motion for recusal was an appeal, not an action for a writ of mandamus, the presiding judge properly denied a pro se litigant's motion to recuse and declined the litigant relief. Gray v. Manis, 282 Ga. 336, 647 S.E.2d 588 (2007).

Mandamus cannot dictate where boundary line to be located. — Trial court erred by granting a county mandamus relief in a county boundary line dispute action pursuant to O.C.G.A. § 36-3-20 et seq. because while mandamus was authorized to compel the Georgia Secretary of State to do certain tasks, it was not authorized to dictate where the boundary line was to be located. Bibb County v. Monroe County, 294 Ga. 730, 755 S.E.2d 760 (2014).

Petition for mandamus properly dismissed. — The trial court properly dismissed a landowners' petition for mandamus filed against a judge as premature and for failing to state a claim, because the landowner opted to file the petition, but could have requested a hearing to allow the judge an opportunity to rule on the previously filed motions; the 90-day ruling period applicable to the motions pursuant to O.C.G.A. § 15-6-21(b) had not yet expired at the time the petition had been filed. Voyles v. McKinney, 283 Ga. 169, 657 S.E.2d 193 (2008).

Discretionary standard required application. — Trial court erred by granting mandamus relief under O.C.G.A. § 9-6-20 with regard to a property owner seeking to compel a county to maintain roads in a subdivision because while the county had accepted dedication of the streets, the county still was vested with the discretion to decide whether to open all the roads or close any of the roads, and the trial court was required to determine whether the county's decisions were arbitrary, capricious, and unreasonable or a gross abuse of discretion as nowhere in the judgment was that standard articulated. Burke County v. Askin, 291 Ga. 697, 732 S.E.2d 416 (2012).

9-6-21. Not a private remedy; enforcement of officer's discretionary acts.

JUDICIAL DECISIONS

Duty of county to complete an unfinished road. — County, which had accepted dedication of a subdivision road in 1962 but had not completed the road or maintained the road for 50 years, due to the county's mistaken belief that the road was private, was ordered to complete and maintain the road; the county's failure to complete the road was arbitrary and capricious, given the county's acceptance of subdivision plats requiring the road. As to unopened roads in the subdivision, the roads were not public under O.C.G.A. § 9-6-21(b), and the county had no obligation to maintain the road. Burke County v. Askin, 294 Ga. 634, 755 S.E.2d 747 (2014).

Mandamus action challenging county board's decision abandoning road. — In a mandamus action, a trial court erred by reversing a decision of a county board of commissioners to abandon a road as the trial court failed to give proper deference to the board's decision to abandon the road and substituted the court's own judgment for that of the board. Scarborough v. Hunter, 293 Ga. 431, 746 S.E.2d 119 (2013).

Application. — Trial court properly did not apply O.C.G.A. § 9-6-21 to a case brought by a property owner seeking mandamus relief to compel a county to open and maintain roads in a subdivision because neither party was a citizen entitled to petition the court as required by the statute. Burke County v. Askin, 291 Ga. 697, 732 S.E.2d 416 (2012).

Cited in Magistrate Court v. Fleming, 284 Ga. 457, 667 S.E.2d 356 (2008).

9-6-23. Enforcement of corporation's public duty.

JUDICIAL DECISIONS

Mandamus unavailable for nominee seeking to serve on electric membership corporation. — Trial court erred by granting a nominee's writ of mandamus because under O.C.G.A. § 9-6-23, mandamus did not lie to enforce purely private contract rights and the nominee's efforts to be qualified as a person to sit on the board of an electric membership corporation was a private right as board members were not public officers within the meaning of O.C.G.A. § 9-6-20. Rigby v. Boatright, 294 Ga. 253, 751 S.E.2d 851 (2013).

If mandamus is not proper, a mandatory injunction may be proper. — Mere fact that a court order is mandatory, rather than prohibitive, does not transform injunctive relief into a writ of mandamus, and an injunction is not void merely because it is mandatory in nature. Moreover, a trial court may issue a mandatory injunction when mandamus relief is not available. Rigby v. Boatright, 330 Ga. App. 181, 767 S.E.2d 783 (2014).

9-6-24. What interest required to enforce public right.

JUDICIAL DECISIONS

Citizens suit seeking performance of public duty in completing park. — Citizens who challenged the use of Special Local Option Sales Tax funds had standing to seek a writ of mandamus under O.C.G.A. § 9-6-24 as the citizens alleged that governmental entities failed to perform their public duty of completing a park that was allegedly promised to voters. Rothschild v. Columbus Consol. Gov't, 285 Ga. 477, 678 S.E.2d 76 (2009).

Taxpayer could seek to compel state revenue commissioner to accept tax returns. — In a gas company's suit against the state revenue commissioner for mandamus compelling the commissioner to accept its property tax returns under O.C.G.A. §§ 48-1-2(21) and 48-5-511(a), remand was proper to determine if the company had an acceptable alternative remedy in its pending county tax appeals under O.C.G.A. § 48-5-311, as required by O.C.G.A. § 9-6-20, if the commissioner could be made a party to those appeals by joinder or some other procedure. Southern LNG, Inc. v. MacGinnitie, 294 Ga. 657, 755 S.E.2d 683 (2014).

Cited in Deal v. Coleman, 294 Ga. 170, 751 S.E.2d 337 (2013); SJN Props., LLC v. Fulton County Bd. of Assessors, 296 Ga. 793, 770 S.E.2d 832 (2015).

9-6-26. Mandamus not granted where fruitless, nor on suspicion.

JUDICIAL DECISIONS

Denial of mandamus relief improper. — Trial court erred in denying the children's petition for writ of mandamus to compel a judge to allow the children to appeal from the order dismissing their appeals because the children showed that the children had a clear legal right to file a direct appeal from the order dismissing their properly filed direct appeals and that granting mandamus relief would not be nugatory since the notices of appeal were proper and valid. Sotter v. Stephens, 291 Ga. 79, 727 S.E.2d 484 (2012).

9-6-27. Time of hearing; notice; how and when issues of fact determined.

JUDICIAL DECISIONS

Proper notice of hearing. — In an action by a city to, inter alia, compel a county tax commissioner to pay school tax receipts, a trial court erred in converting a hearing on an interlocutory injunction into a final hearing on a permanent injunction and a writ of mandamus without the proper notice under O.C.G.A. § 9-6-27(a); the commissioner was only given two days' notice and also did not consent to having any mandamus issue heard by the trial court without a jury under § 9-6-27(c) or to having the request for permanent injunctive relief under

O.C.G.A. § 9-11-65(a)(2) heard at the same time. Ferdinand v. City of Atlanta, 285 Ga. 121, 674 S.E.2d 309 (2009).

When no hearing required. — A litigant was not entitled to a hearing on a petition for a writ of mandamus against a judge in a defamation action against the litigant under O.C.G.A. § 9-6-27(a) because no mandamus nisi issued, and neither the litigant nor the judge requested oral argument under Ga. Unif. Super. Ct. R. 6.3. Watson v. Matthews, 286 Ga. 784, 692 S.E.2d 338 (2010).

Trial court did not err in denying the plaintiff's request for a mandamus nisi without first holding a hearing as the mandamus statute clearly authorizes the trial court to deny a request if the petition is meritless. Hansen v. DeKalb County Board of Tax Assessors, 295 Ga. 385, 761 S.E.2d 35 (2014).

ARTICLE 3

PROHIBITION

9-6-40. Prohibition counterpart of mandamus.

The writ of prohibition is the counterpart of mandamus, to restrain subordinate courts and inferior judicial tribunals from exceeding their jurisdiction where no other legal remedy or relief is given. The granting or refusal thereof is governed by the same principles of right, necessity, and justice as apply to mandamus; provided, however, that no writ of prohibition to compel the removal of a judge shall issue where no motion to recuse has been filed, if such motion is available, or where a motion to recuse has been denied after assignment to a separate judge for hearing. (Orig. Code 1863, § 3136; Code 1868, § 3148; Code 1873, § 3209a; Code 1882, § 3209a; Civil Code 1895, § 4885; Civil Code 1910, § 5458; Code 1933, § 64-301; Ga. L. 2009, p. 643, § 2/HB 221.)

The 2009 amendment, effective July 1, 2009, deleted a comma following "jurisdiction" in the first sentence and added the proviso at the end of the second sentence.

JUDICIAL DECISIONS

Writ not applicable to magistrate court policy decisions. — Because the State, in the person of the District Attorney, attempted to avoid the restrictions in O.C.G.A. § 5-7-1 et seq., by attacking by way of mandamus and prohibition an alleged magistrate court policy concerning rulings made in criminal prosecutions, and because the State had no ability to appeal the policy, the trial court erred by considering the State's petition for mandamus and prohibition. Magistrate Court v. Fleming, 284 Ga. 457, 667 S.E.2d 356 (2008).

Application of laches to mandamus. — Supreme Court of Georgia concludes that case law supporting that a mandamus action can be barred by gross laches is the correct rule; thus, Crow v. McCallum, 215 Ga. 692 (1960), and its progeny were wrongly decided and overruled. Marsh v. Clarke County Sch. Dist., 292 Ga. 28, 732 S.E.2d 443 (2012).

ARTICLE 4

QUO WARRANTO

9-6-60. For what purpose quo warranto may issue; who may bring action.

JUDICIAL DECISIONS

Issuance of quo warranto improper. — Trial court erred in granting a citizen a writ of quo warranto revoking county board of equalization (BOE) members' appointments because although BOE members were public officers subject to quo warranto, the citizen's petition for a writ of quo warranto was subject to dismissal when the citizen did not seek leave of court prior to filing the complaint; although the trial court purported to award, in the alternative, a permanent injunction prohibiting the members from serving on the BOE until they were statutorily qualified, such relief was improper as an alternative to the writ of quo warranto. Everetteze v. Clark, 286 Ga. 11, 685 S.E.2d 72 (2009).

Cited in Marsh v. Clarke County Sch. Dist., 292 Ga. 28, 732 S.E.2d 443 (2012).

9-6-63. Service of writ and process.

JUDICIAL DECISIONS

Third parties. — In an action seeking quo warranto, because the trial court's order was not directed at a party not served, and did not require that party to do anything, a third party lacked any legal right to complain that the party was not served. City of College Park v. Wyatt, 282 Ga. 479, 651 S.E.2d 686 (2007).

9-6-64. How issues of law determined; time for final determination; appeal; application to issues of fact.

JUDICIAL DECISIONS

Jury trial was not required, etc.

In a quo warranto proceeding, because the only real point of contention concerned a question of law, specifically whether the city was empowered to remove a board member, and the answer to that question lied within the board's enabling legislation and bylaws, the trial court did not err in failing to conduct an evidentiary hearing. City of College Park v. Wyatt, 282 Ga. 479, 651 S.E.2d 686 (2007).

9-6-65. Jury trial where facts at issue; time of trial; continuances.

JUDICIAL DECISIONS

Jury trial was not required, etc.

In a quo warranto proceeding, because the only real point of contention concerned a question of law, specifically whether the city was empowered to remove a board member, and the answer to that question lied within the board's enabling legislation and bylaws, the trial court did not err

in failing to conduct an evidentiary hearing. City of College Park v. Wyatt, 282 Ga. 479, 651 S.E.2d 686 (2007).

CHAPTER 7

AUDITORS

9-7-1. Duties of auditor.

Law reviews. — For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010).

JUDICIAL DECISIONS

Notice of consideration of appointment of special master required. — Although the parties were on notice that the trial court was considering the appointment of an auditor, the trial court's failure to provide notice and an opportunity to be heard before appointing a special master violated Ga. Unif. Super. Ct. R. 46(B)(1); the trial court otherwise failed to make findings required by Rule 46. Petrakopoulos v. Vranas, 325 Ga. App. 332, 750 S.E.2d 779 (2013).

Failure to pay fees prior to appealing. — Because a former owner of property did not pay the special master's fees before appealing, as required by O.C.G.A. §§ 9-7-1 and 9-7-22(c), the former owner's appeal from the grant of a writ of possession to a tax sale buyer was dismissed. The requirement to pay the fees before appealing was mandatory and jurisdictional. Davis v. Harpagon Co., LLC, 300 Ga. App. 644, 686 S.E.2d 259 (2009), cert. denied, No. S10C0438, 2010 Ga. LEXIS 200 (Ga. 2010).

Cited in Alston & Bird LLP v. Mellon Ventures II, L.P., 307 Ga. App. 640, 706 S.E.2d 652 (2010).

9-7-3. Appointment of auditor in matters of account; on application and notice; on court's own motion.

JUDICIAL DECISIONS

Cited in Petrakopoulos v. Vranas, 325 Ga. App. 332, 750 S.E.2d 779 (2013).

9-7-6. Powers of auditor generally.

JUDICIAL DECISIONS

Cited in Petrakopoulos v. Vranas, 325 Ga. App. 332, 750 S.E.2d 779 (2013).

9-7-8. Contents of report — Rulings, findings, and conclusions.

JUDICIAL DECISIONS

Presenting auditor's report to the jury. — Trial court did not err in refusing to present the noncompliant auditor's report to the jury because the report, which erroneously commingled the factual findings and legal conclusions, would impose a disadvantage and prejudice a camp in the camp's efforts to obtain a fair resolution of the camp's exceptions before a jury, and the parties stipulated to a procedure in which the case would be decided without recommitting the auditor's report for correction. Camp Cherokee, Inc. v. Marina Lane, LLC, 316 Ga. App. 366, 729 S.E.2d 510 (2012).

9-7-13. When report recommitted.

JUDICIAL DECISIONS

Presenting auditor's report to the jury. — Trial court did not err in refusing to present the noncompliant auditor's report to the jury because the report, which erroneously commingled the factual findings and legal conclusions, would impose a disadvantage and prejudice a camp in the camp's efforts to obtain a fair resolution of the camp's exceptions before a jury, and the parties stipulated to a procedure in which the case would be decided without recommitting the auditor's report for correction. Camp Cherokee, Inc. v. Marina Lane, LLC, 316 Ga. App. 366, 729 S.E.2d 510 (2012).

9-7-16. Exceptions of law for judge.

JUDICIAL DECISIONS

Trial court authorized to reject auditor's erroneous ruling. — Trial court did not err in reversing an auditor's decision because the trial court was authorized to reject the auditor's erroneous legal rulings. Camp Cherokee, Inc. v. Marina Lane, LLC, 316 Ga. App. 366, 729 S.E.2d 510 (2012).

9-7-19. When new testimony considered; application; notice; rights of opposite party.

JUDICIAL DECISIONS

Admittance of newly discovered evidence. — Trial court did not err in granting a camp's request to present new evidence as to the camp's damages because the evidence of the damages incurred after the auditor's proceedings amounted to newly discovered evidence. Camp Cherokee, Inc. v. Marina Lane, LLC, 316 Ga. App. 366, 729 S.E.2d 510 (2012).

9-7-22. Auditor's fees.

Law reviews. — For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010).

JUDICIAL DECISIONS

Failure to pay fees prior to appealing. — Because a former owner of property did not pay the special master's fees before appealing, as required by O.C.G.A. §§ 9-7-1 and 9-7-22(c), the former owner's appeal from the grant of a writ of possession to a tax sale buyer was dismissed. The requirement to pay the fees before appealing was mandatory and jurisdictional. Davis v. Harpagon Co., LLC, 300 Ga. App. 644, 686 S.E.2d 259 (2009), cert. denied, No. S10C0438, 2010 Ga. LEXIS 200 (Ga. 2010).

CHAPTER 8

RECEIVERS

9-8-1. Appointment of receiver — Grounds generally.

Law reviews. — For article, "Buying Distressed Commercial Real Estate: What are the Alternatives?," see 16 (No. 4) Ga. St. B.J. 18 (2010).

JUDICIAL DECISIONS

Appointment of receiver proper to protect assets. — Trial court did not abuse the court's discretion in issuing an interlocutory injunction enjoining officers from disposing of any of the documents or assets of a corporation and continuing a receivership because the officers controlled the assets that were a subject of the litigation, raising the possibility that the assets could be dissipated before the litigation is resolved; although the officers made several vague arguments about the powers granted to the receiver, the officers failed to show that the trial court abused the court's discretion in granting those powers. Pittman v. State, 288 Ga. 589, 706 S.E.2d 398 (2011).

While the borrowers argued that the appointment of a receiver was improper because the bank had an adequate remedy at law, the supreme court presumed that there was sufficient evidence to support the appointment, such as evidence that the assets at issue were being dissipated. Alstep, Inc. v. State Bank & Trust Co., 293 Ga. 311, 745 S.E.2d 613 (2013).

Evidence of partner's misappropriation of law firm property justified appointment of receiver. — Evidence that a partner misappropriated a law firm's funds before the partners decided to dissolve the firm; borrowed money on the firm's line of credit without the other partner's permission and without notifying the bank that the firm was going to be dissolved; and took records from the firm, including most personal injury files, supported the appointment of a receiver under O.C.G.A. §§ 9-8-1 and 9-8-3. Fulp v. Holt, 284 Ga. 751, 670 S.E.2d 785 (2008).

Receiver properly denied.

Trial court's order denying a shareholder's request for the appointment of a receiver for a corporation under O.C.G.A. § 9-8-1 was proper because there was no showing that the appointment of a receiver could have reversed an improper tax election by the corporation and, although the corporation's president inaccurately represented before 2000 that the president was the sole owner of the corporation, the corporate structure had clearly been recognized since that time, and it was not shown that these prior representations affected the current or future operation of the corporation; further, although the funds for a building's purchase were paid from the president's personal account, it was undisputed that the building was now owned by the corporation,

and the evidence was that improper corporate expenditures had been adjusted in the audit so as to ensure that the shareholder's proper share of the corporation was accurately measured. There was no showing that the president or the corporation were insolvent, or that the shareholder would not have been able to ultimately gain the shareholder's appropriate share of the corporation's value. Treu v. Humanism Inv., Inc., 284 Ga. 657, 670 S.E.2d 409 (2008).

Cited in Petrakopoulos v. Vranas, 325 Ga. App. 332, 750 S.E.2d 779 (2013).

9-8-2. Appointment of receiver — To protect trust or joint property.

JUDICIAL DECISIONS

Cited in Petrakopoulos v. Vranas, 325 Ga. App. 332, 750 S.E.2d 779 (2013).

9-8-3. Appointment of receiver — To hold assets liable for debt; appointment without notice; terms.

Law reviews. — For article, "Buying Distressed Commercial Real Estate: What are the Alternatives?," see 16 (No. 4) Ga. St. B.J. 18 (2010).

JUDICIAL DECISIONS

Evidence of partner's misappropriation of law firm property justified appointment of receiver. — Evidence that a partner misappropriated a law firm's funds before the partners decided to dissolve the firm; borrowed money on the firm's line of credit without the other partner's permission and without notifying the bank that the firm was going to be dissolved; and took records from the firm, including most personal injury files, supported the appointment of a receiver under O.C.G.A. §§ 9-8-1 and 9-8-3. Fulp v. Holt, 284 Ga. 751, 670 S.E.2d 785 (2008).

Evidence supported depositing all fees originated by law firm with receiver. — Although a partnership agreement entitled each of the two law partners to one-half of the fees generated by the law firm, evidence that one partner had misappropriated some of the firm's funds authorized the trial court to order that all fees originated by that firm be deposited with the receiver. Fulp v. Holt, 284 Ga. 751, 670 S.E.2d 785 (2008).

Cited in Petrakopoulos v. Vranas, 325 Ga. App. 332, 750 S.E.2d 779 (2013).

9-8-4. Caution to be exercised in appointing receiver.

JUDICIAL DECISIONS

Appointment of receiver proper to protect assets. — Trial court did not abuse the court's discretion in issuing an interlocutory injunction enjoining officers from disposing of any of the documents or assets of a corporation and continuing a receivership because the officers controlled the assets that were a subject of the litigation, raising the possibility that the assets could be dissipated before the litigation is resolved; although the officers made several vague arguments about the powers granted to the receiver, the officers failed to show that the trial court abused the court's discretion in granting those powers. Pittman v. State, 288 Ga. 589, 706 S.E.2d 398 (2011).

Receiver properly denied.

Trial court's order denying a shareholder's request for the appointment of a re-

ceiver for a corporation under O.C.G.A. § 9-8-1 was proper because there was no showing that the appointment of a receiver could have reversed an improper tax election by the corporation and, although the corporation's president inaccurately represented before 2000 that the president was the sole owner of the corporation, the corporate structure had clearly been recognized since that time, and it was not shown that these prior representations affected the current or future operation of the corporation; further, although the funds for a building's purchase were paid from the president's personal account, it was undisputed that the building was now owned by the corporation, and the evidence was that improper corporate expenditures had been adjusted in the audit so as to ensure that the shareholder's proper share of the corporation was accurately measured. There was no showing that the president or the corporation were insolvent, or that the shareholder would not have been able to ultimately gain the shareholder's appropriate share of the corporation's value. Treu v. Humanism Inv., Inc., 284 Ga. 657, 670 S.E.2d 409 (2008).

Receiver properly appointed after dissolution of limited liability company sought. — After proceedings for dissolution of a limited liability company (LLC) were brought under O.C.G.A. § 14-11-603, the trial court properly appointed a neutral receiver to manage the affairs of the LLC during the pendency of further proceedings. The parties, who each owned half shares in the LLC, could not agree about the management of the LLC and its financial affairs, and even when accountants were hired to conduct an audit of the LLC, a meaningful accounting could not be done because the parties provided conflicting, incomplete, and inconsistent information to the accountants. Ga. Rehab. Ctr., Inc. v. Newnan Hosp., 283 Ga. 335, 658 S.E.2d 737 (2008).

No transcript meant court assumed receiver proper. — In a case involving the appointment of a receiver to sell certain real property owned by a property owner in order to satisfy a judgment a creditor obtained against the property owner, the state supreme court had to assume, in the absence of a transcript, that there was sufficient competent evidence to support the trial court's findings. Popham v. Yancey, 284 Ga. 467, 667 S.E.2d 353 (2008).

Cited in Alstep, Inc. v. State Bank & Trust Co., 293 Ga. 311, 745 S.E.2d 613 (2013); Petrakopoulos v. Vranas, 325 Ga. App. 332, 750 S.E.2d 779 (2013).

9-8-6. Lienholders made parties; divestment by receiver's sale.

Law reviews. — For article, "Buying Distressed Commercial Real Estate: What are the Alternatives?," see 16 (No. 4) Ga. St. B.J. 18 (2010).

9-8-8. Receiver an officer of court; subject to court's orders or removal.

JUDICIAL DECISIONS

Expansion of receiver's powers to effectuate court ordered duties. — Trial court properly entered an order expanding the powers of a receiver who was appointed to oversee the operation of a limited liability company (LLC) during the pendency of a judicial dissolution of the LLC where the order was based on an affidavit the receiver submitted that indicated the receiver was unable to fulfill the receiver's duties due to the actions of one of the 50% owners of the LLC. Ga. Rehab. Ctr., Inc. v. Newnan Hosp., 284 Ga. 68, 663 S.E.2d 204 (2008).

9-8-10. Receiver's bond.

JUDICIAL DECISIONS

Failure to give bond not an abuse of discretion. — Because officers failed to move in the trial court for the state to post a bond under the Georgia Racketeer Influenced and Corrupt Organization Act, O.C.G.A. § 16-14-6(b), the officers' claim that the trial court erred in not requiring the state to post a bond would not be considered on appeal; the officers did move for the receiver to post a bond, but the trial court had discretion whether or not to require the receiver to give bond for the faithful discharge of the trust reposed, O.C.G.A. § 9-8-10, and the trial court did not abuse that discretion. Pittman v. State, 288 Ga. 589, 706 S.E.2d 398 (2011).

9-8-13. Award of attorneys' and receivers' fees; how determined.

JUDICIAL DECISIONS

Compensation of receiver determined by court.

Because the corporations and the corporates' principals did not comply with Ga. Ct. App. R. 25(c)(2) by providing legal authority to support their contentions, the trial court properly set the receiver's fees pursuant to O.C.G.A. § 9-8-13, half of which was to be paid by the corporations and the corporations' principal jointly and severally. D.C. Micro Dev., Inc. v. Briley, 310 Ga. App. 309, 714 S.E.2d 11 (2011).

CHAPTER 9

ARBITRATION

Article 1

General Provisions

Part 1

Arbitration Code

Part 2

International Commercial Arbitration Code

ARTICLE 1

GENERAL PROVISIONS

Law reviews. — For article, "International Arbitration in Georgia," see 16 (No. 6) Ga. St. B.J. 13 (2011). For annual survey on construction law, see 66 Mercer L. Rev. 27 (2014).

PART 1

ARBITRATION CODE

Law reviews. — For article, "International Arbitration in Georgia," see 16 (No. 6) Ga. St. B.J. 13 (2011). For annual survey on construction law, see 66 Mercer L. Rev. 27 (2014).

9-9-1. Short title.

Law reviews. — For article, "Methods for Discovery in Arbitration," see 13 Ga. St. B.J. 22 (2008). For survey article on construction law, see 60 Mercer L. Rev. 59 (2008). For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010). For article, "International Arbitration in Georgia," see 16 (No. 6) Ga.

St. B.J. 13 (2011). For annual survey on construction law, see 66 Mercer L. Rev. 27 (2014).

JUDICIAL DECISIONS

Trial court's role.

Because the jurisdictional issues the subcontractor raised could not be resolved until after a de novo examination of whether the parties agreed to arbitrate their dispute, the superior court's order confirming an arbitration award had to be vacated, and the case remanded, and if the court found that the parties agreed to the version of their subcontractor's agreement which contained the choice of forum and arbitration clause, personal jurisdiction and venue were proper and the arbitrator's award was to be confirmed. Panhandle Fire Prot., Inc. v. Batson Cook Co., 288 Ga. App. 194, 653 S.E.2d 802 (2007).

Cited in Turner County v. City of Ashburn, 293 Ga. 739, 749 S.E.2d 685 (2013).

9-9-2. Applicability; exclusive method.

(a) Part 3 of Article 2 of this chapter, as it existed prior to July 1, 1988, applies to agreements specified in subsection (b) of this Code section made between July 1, 1978, and July 1, 1988. This part applies to agreements specified in subsection (b) of this Code section made on or after July 1, 1988, and to disputes arising on or after July 1, 1988, in agreements specified in subsection (c) of this Code section.

(b) Part 3 of Article 2 of this chapter, as it existed prior to July 1, 1988, shall apply to construction contracts, contracts of warranty on construction, and contracts involving the architectural or engineering design of any building or the design of alterations or additions thereto made between July 1, 1978, and July 1, 1988, and on and after July 1, 1988, this part shall apply as provided in subsection (a) of this Code section and shall provide the exclusive means by which agreements to arbitrate disputes arising under such contracts can be enforced.

(c) This part shall apply to all disputes in which the parties thereto have agreed in writing to arbitrate and shall provide the exclusive means by which agreements to arbitrate disputes can be enforced, except the following, to which this part shall not apply:

(1) Agreements coming within the purview of Article 2 of this chapter, relating to arbitration of medical malpractice claims;

(2) Any collective bargaining agreements between employers and labor unions representing employees of such employers;

(3) Any contract of insurance, as defined in paragraph (1) of Code Section 33-1-2; provided, however, that nothing in this paragraph shall impair or prohibit the enforcement of or in any way invalidate an arbitration clause or provision in a contract between insurance companies;

(4) Any other subject matters currently covered by an arbitration statute;

(5) Any loan agreement or consumer financing agreement in which the amount of indebtedness is $25,000.00 or less at the time of execution;

(6) Any contract for the purchase of consumer goods, as defined in Title 11, the "Uniform Commercial Code," under subsection (1) of Code Section 11-2-105 and subsection (a) of Code Section 11-9-102;

(7) Any contract involving consumer acts or practices or involving consumer transactions as such terms are defined in subsection (a) of Code Section 10-1-392, relating to definitions in the "Fair Business Practices Act of 1975";

(8) Any sales agreement or loan agreement for the purchase or financing of residential real estate unless the clause agreeing to arbitrate is initialed by all signatories at the time of the execution of the agreement. This exception shall not restrict agreements between or among real estate brokers or agents;

(9) Any contract relating to terms and conditions of employment unless the clause agreeing to arbitrate is initialed by all signatories at the time of the execution of the agreement; or

(10) Any agreement to arbitrate future claims arising out of personal bodily injury or wrongful death based on tort. (Code 1933, § 7-302, enacted by Ga. L. 1978, p. 2270, § 1; Ga. L. 1979, p. 393, § 1; Code 1981, § 9-9-81; Code 1981, § 9-9-2, as redesignated by Ga. L. 1988, p. 903, § 1; Ga. L. 1997, p. 1556, § 1; Ga. L. 2001, p. 362, § 25; Ga. L. 2009, p. 1001, § 1/HB 189; Ga. L. 2013, p. 141, § 9/HB 79.)

The 2009 amendment, effective July 1, 2009, deleted "paragraphs (2) and (3) of" preceding "subsection (a)" in the middle of paragraph (c)(7). See the Editor's note for applicability.

The 2013 amendment, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, added "or" at the end of paragraph (c)(9).

Editor's notes. — Ga. L. 2009, p. 1001, § 6, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall be applicable to all contracts for private collection of child support payments entered into on or after July 1, 2009.

Law reviews. — For article, "Georgia Condominium Law: Beyond the Condominium Act," see 13 Ga. St. B.J. 24 (2007). For survey article on insurance law, see 59 Mercer L. Rev. 195 (2007). For survey article on real property law, see 60 Mercer L. Rev. 345 (2008). For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008).

JUDICIAL DECISIONS

Federal Arbitration Act, 9 U.S.C. § 1 et seq.

O.C.G.A. § 9-9-2(c)(9), requiring that arbitration clauses be separately initialed, and O.C.G.A. § 9-9-2(c)(10), exempting personal bodily injury claims

from arbitration, were preempted by the Federal Arbitration Act, 9 U.S.C. § 1 et seq., in an employment dispute between an employee and a brokerage firm. Davidson v. A. G. Edwards & Sons, Inc., 324 Ga. App. 172, 748 S.E.2d 300 (2013).

No application when no employer-employee relationship. — When a seller of companies challenged a covenant not to compete and an arbitration clause in the purchase agreement, O.C.G.A. § 9-9-2 did not govern the agreement between the seller and the purchaser because the seller and purchaser did not share an employer-employee relationship. Weiner v. Tootsie Roll Indus., No. 10-12989, 2011 U.S. App. LEXIS 2136 (11th Cir. Feb. 2, 2011) (Unpublished).

Fair Business Practices Act claim covered by arbitration clause. — Trial court erred in refusing to compel arbitration as to all counts of buyers' complaint against a seller to recover damages for construction defects in the buyers' new home because the claim the buyers asserted under the Fair Business Practices Act of 1975, O.C.G.A. § 10-1-390 et seq., was covered by the arbitration clause of the parties' agreement since the arbitration clause of the agreement was specifically included within the ambit of the Georgia Arbitration Code (GAC) by O.C.G.A. § 9-9-2(c)(8) when the parties initialed the arbitration clause as required by the GAC; because the GAC applied to the agreement's arbitration clause by reason of § 9-9-2(c)(8), the arbitration clause was not excluded from the GAC by the "consumer transactions" exception of O.C.G.A. § 9-9-2(c)(7). Order Homes, LLC v. Iverson, 300 Ga. App. 332, 685 S.E.2d 304 (2009).

Initialing arbitration clause in home buyers' warranty not required. — It was not necessary that an arbitration provision in a home buyer's warranty be initialed for the provision to be enforceable. O.C.G.A. § 9-9-2(c)(8), requiring initialing, did not apply to home buyers' warranties; moreover, under a choice of law clause, the warranty was governed by the Federal Arbitration Act, which preempted Georgia's initialing requirement. Harrison v. Eberhardt, 287 Ga. App. 561, 651 S.E.2d 826 (2007).

Agreement to submit to binding arbitration.

Trial court did not err in dismissing a spouse's claims against a builder on the ground that the spouse was equitably estopped from asserting claims for negligent construction and breach of warranty since the spouse was subject to the arbitration clause contained in a purchase-and-sale agreement the other spouse entered into with the builder because the claims of negligent construction and breach of warranty arose under, and presumed the existence of, the purchase-and-sale agreement, and the claims were so intertwined with the other spouse's claims against the builder that the spouse was estopped from avoiding arbitration. Moreover, the husband and wife asserted the same claims against the builders, thus requiring the spouse to assert the spouse's claims in the same forum as the husband eliminated the potential for varying decisions, discreditable to the administration of justice. Helms v. Franklin Builders, Inc., 305 Ga. App. 863, 700 S.E.2d 609 (2010).

Arbitration limited to agreed issues.

A trial court did not err in dismissing a complaint, which sought to try the issues of breach of fiduciary duty asserted by plaintiffs, as the parties, at least implicitly, if not expressly, agreed to submit the fiduciary duty claims to arbitration, which were thereafter denied by the arbitration award. Although plaintiffs initially sought to exclude the fiduciary duty claims from the arbitration, plaintiffs presented evidence on the elements of a breach of fiduciary duty and asserted that those claims were before the arbitrator. Ansley Marine Constr., Inc. v. Swanberg, 290 Ga. App. 388, 660 S.E.2d 6 (2008), cert. denied, 2008 LEXIS 673 (Ga. 2008).

Arbitration agreements in insurance policies.

Though agreement between insurer and Chapter 11 debtor had a binding arbitration clause, insurer's motion to dismiss debtor's complaint seeking recovery of overpaid premiums to benefit bankruptcy estate was overruled because agreement was an "insurance contract" to which anti-arbitration provision in O.C.G.A. § 9-9-2(c)(3), which was enforceable per

McCarran-Ferguson Act, 15 U.S.C. § 1012(b), applied. Davis v. Zurich Am. Ins. Co. (In re TFI Enters.), No. 05-40683 RFH, 2008 Bankr. LEXIS 1059 (Bankr. M.D. Ga. Apr. 9, 2008).

O.C.G.A. § 9-9-2(c)(3) invalidates arbitration agreements in insurance contracts as defined in O.C.G.A. § 33-1-2, with the exception that it does not prohibit enforcement of arbitration agreements in contracts between insurance companies; simply stated, in Georgia a contract of insurance is not subject to arbitration unless the contract is between insurance companies. Davis v. Zurich Am. Ins. Co. (In re TFI Enters.), No. 05-40683 RFH, 2008 Bankr. LEXIS 1059 (Bankr. M.D. Ga. Apr. 9, 2008).

Health care power of attorney does not confer authority to sign arbitration agreement. — Health care facility's motion to compel arbitration of a child's wrongful death claim was properly denied. As a durable health care power of attorney a parent gave the child did not authorize the child to bind the parent to arbitration, the agreement to arbitrate signed by the child was unenforceable. Life Care Ctrs. of Am. v. Smith, 298 Ga. App. 739, 681 S.E.2d 182 (2009), cert. denied, No. S09C1873, 2010 Ga. LEXIS 165 (Ga. 2010).

9-9-3. Effect of arbitration agreement.

JUDICIAL DECISIONS

Right to enforcement of arbitration clause.

Trial court erred in refusing to compel arbitration as to all counts of the buyers' complaint against a seller to recover damages for construction defects in the buyers' new home because the arbitration clause in the parties' agreement was broad enough to cover the buyers' claims for equitable rescission; the buyers did not attack the validity of the agreement to arbitrate but instead argued that the entire contract should be rescinded due to fraud. Order Homes, LLC v. Iverson, 300 Ga. App. 332, 685 S.E.2d 304 (2009).

Parties entered into a valid, enforceable agreement to arbitrate the underlying dispute; by executing the Affiliation Resolution, defendant agreed to accept the Discipline—a collection of rules and procedure and organization—which contained a conflict resolution provision. The underlying dispute was a non-doctrinal dispute as it was a property dispute arising from, or related to, defendant's withdrawal from plaintiff, consequently it was subject to the conflict resolution provision; further, legal constraints external to the parties' agreement did not foreclose arbitration. General Conf. of the Evangelical Methodist Church v. Evangelical Methodist Church of Dalton, No. 4:11-CV-0186-HLM, 2011 U.S. Dist. LEXIS 100450 (N.D. Ga. Aug. 22, 2011).

Trial court erred by denying a client's motion to compel arbitration of the claim against a debt settlement corporation for violations of the debt adjusting statutes, O.C.G.A. § 18-5-1 et seq., because the arbitration provision in the debt settlement agreement mandated arbitration of all disputes and claims between the parties related to the agreement and the claim that the corporation violated statutes regulating the business of debt adjusting was connected to the debt settlement agreement. Penso Holdings, Inc. v. Cleveland, 324 Ga. App. 259, 749 S.E.2d 821 (2013).

9-9-4. Application to court; venue; service of papers; scope of court's consideration; application for order of attachment or preliminary injunction.

Law reviews. — For survey article on construction law, see 60 Mercer L. Rev. 59 (2008).

JUDICIAL DECISIONS

Role of court.

Because the jurisdictional issues the subcontractor raised could not be resolved until after a de novo examination of whether the parties agreed to arbitrate their dispute, the superior court's order confirming an arbitration award had to be vacated, and the case remanded, and if the court found that the parties agreed to the version of their subcontractor's agreement which contained the choice of forum and arbitration clause, personal jurisdiction and venue were proper and the arbitrator's award was to be confirmed. Panhandle Fire Prot., Inc. v. Batson Cook Co., 288 Ga. App. 194, 653 S.E.2d 802 (2007).

Arbitration under O.C.G.A. § 9-9-4(d) was properly compelled, etc.

for debtors' claim for a setoff from amounts due under a note because the parties' agreement contained an arbitration provision, and the setoff claim sought affirmative relief, which arose from the parties' business relationship. Dunaway v. UAP/GA AG. Chem., Inc., 301 Ga. App. 282, 687 S.E.2d 211 (2009), cert. denied, No. S10C0550, 2010 Ga. LEXIS 297 (Ga. 2010).

Arbitrator did not overstep the arbitrator's authority under O.C.G.A. § 9-9-13(b)(3) in denying debtors' claim for a setoff from amounts due under a note because the award reflected the fact that the arbitrator considered the debtors' evidence and produced a definite award. Dunaway v. UAP/GA AG. Chem., Inc., 301 Ga. App. 282, 687 S.E.2d 211 (2009), cert. denied, No. S10C0550, 2010 Ga. LEXIS 297 (Ga. 2010).

Trial court properly granted a former employer's motion to compel arbitration because there was a causal connection between the former employee's claims for defamation, tortious interference with a business expectancy, and lost income and the former employee's employment and termination and the arbitration agreement clearly provided that the agreement applied to any employment-related claims. Wedemeyer v. Gulfstream Aero. Corp., 324 Ga. App. 47, 749 S.E.2d 241 (2013).

Cited in Prince v. Bailey Davis, LLC, 306 Ga. App. 59, 701 S.E.2d 492 (2010).

9-9-6. Application to compel or stay arbitration; demand for arbitration; consolidation of proceedings.

Law reviews. — For article, "Construction Law," see 63 Mercer L. Rev. 107 (2011).

JUDICIAL DECISIONS

Procedure when pending matter in another jurisdiction. — Trial court did not err in considering whether under the standards of O.C.G.A. § 9-9-6(a) the court could decide a party's petition to compel arbitration because Georgia courts generally apply Georgia law to procedural matters and, therefore, the trial court properly determined that the court lacked subject matter jurisdiction over the petition since an action was pending in Illinois and there was no showing that § 9-9-6(a) was preempted by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. BDO USA, LLP v. Coe, 329 Ga. App. 79, 763 S.E.2d 742 (2014).

Motion to compel arbitration improperly denied. — Trial court erred in refusing to compel arbitration as to all counts of buyers' complaint against a seller to recover damages for construction defects in the buyers' new home because the parties intended to submit the types of claims in dispute to an arbitrator when the parties agreed to submit to arbitration not only construction defect claims but also "all other claims between the parties;" the arbitration clause in the agree-

ment was not limited to claims sounding in contract but applied to "all other claims" without limitation. Order Homes, LLC v. Iverson, 300 Ga. App. 332, 685 S.E.2d 304 (2009).

An arbitration clause in a contract between an attorney and a client was voidable at the client's option because of the attorney's conflict of interest; thus, it was error not to grant the client's motion to stay arbitration. Moreover, even if the clause were enforceable, the common-law indemnification and contribution claims the attorney sought to arbitrate arose independently of the contract and thus were not covered by the arbitration clause. Harris v. Albany Lime & Cement Co., 291 Ga. App. 474, 662 S.E.2d 160 (2008).

Waiver of right to stay arbitration. — Trial court did not err in denying a limited liability company's (LLC) motion under O.C.G.A. § 9-9-6(b) to stay an arbitration sought by a construction company because the LLC waived the LLC's right to stay the arbitration by participating in the process for 18 months, and the construction company's demands for arbitration put the LLC on notice that the LLC's claims arose out of an understanding between the parties; by participating in and failing to object to the arbitration process, the LLC waived any right the LLC had to stay the proceedings. Atl. Station, LLC v. Vratsinas Constr. Co., 307 Ga. App. 398, 705 S.E.2d 191 (2010).

No right to compel arbitration. — Contractor sued a limited liability company (LLC) and the company's owner to recover payment. As the claims asserted by the contractor were "related to" the contractor's contract with the LLC, even if the claims did not "arise out of" the contract, and the owner was not a party to the contract, the owner's motion to compel arbitration under O.C.G.A. § 9-9-6(a) was properly denied. Tillman Park, LLC v. Dabbs-Williams Gen. Contrs., LLC, 298 Ga. App. 27, 679 S.E.2d 67 (2009).

RESEARCH REFERENCES

ALR. — Consolidation by state court of arbitration proceedings brought under state law, 31 ALR6th 433.

Application of equitable estoppel by nonsignatory to compel arbitration — federal cases. 39 ALR Fed. 2d 17.

Application of equitable estoppel against nonsignatory to compel arbitration under federal law. 43 ALR Fed. 2d 275.

9-9-7. Appointment of arbitrators.

JUDICIAL DECISIONS

Contractual arbitration agreement providing for disputes to be arbitrated by specific entity. — Superior court correctly dismissed homeowners' motion for the appointment of an arbitrator under O.C.G.A. § 9-9-7 because the homeowners had agreed with their builders to arbitrate any dispute with a specific entity under that entity's rules and procedures. Torres v. Piedmont Builders, Inc., 300 Ga. App. 872, 686 S.E.2d 464 (2009).

9-9-8. Time and place for hearing; notice; application for prompt hearing; conduct of hearing; right to counsel; record; waiver.

JUDICIAL DECISIONS

Cited in Patterson v. Long, 321 Ga. App. 157, 741 S.E.2d 242 (2013).

9-9-9. Power of subpoena; enforcement; use of discovery; opportunity to examine documents; compensation of witnesses.

Law reviews. — For article, "Methods for Discovery in Arbitration," see 13 Ga. St. B.J. 22 (2008).

JUDICIAL DECISIONS

Arbitrator not required to issue subpoenas at party's request. — O.C.G.A. § 9-9-9(a) did not require an arbitrator to issue subpoenas on behalf of a party, but only provided that an arbitrator "may" issue subpoenas. Further, the buyers of a home proceeded with the arbitration against their builder despite the lack of subpoenas or a witness list, thereby waiving any error. America's Home Place, Inc. v. Cassidy, 301 Ga. App. 233, 687 S.E.2d 254 (2009).

RESEARCH REFERENCES

ALR. — Discovery in federal arbitration proceedings under discovery provision of Federal Arbitration Act (FAA), 9 USCS § 7, and Federal Rules of Civil Procedure, as permitted by Fed. R. Civ. P. 81(a)(6)(B), 45 ALR Fed. 2d 51.

9-9-10. Award to be in writing; copies furnished; time of making award; waiver.

JUDICIAL DECISIONS

Construction with § 9-9-13. — In the absence of a transcript of an arbitration hearing, the superior court erred in vacating an arbitration award in favor of a plumbing company pursuant to O.C.G.A § 9-9-13(b)(5) because nothing in the record showed that the panel had the specific intent to disregard the appropriate law; further, the arguments provided by the company did not alter this result, as its supposition did not provide viable concrete evidence that the arbitration panel purposefully intended to disregard applicable law. ABCO Builders, Inc. v. Progressive Plumbing, Inc., 282 Ga. 308, 647 S.E.2d 574 (2007).

9-9-12. Confirmation of award by court.

JUDICIAL DECISIONS

Confirmation of arbitration award proper. — Trial court did not err in confirming an arbitration award issued by the State Bar of Georgia arbitration com-

mittee because an attorney was not required to comply with the filing and service requirements imposed by Rule 6-501 of the Arbitration of Fee Disputes (AFD) program of the State Bar; because the attorney elected to file an application for confirmation of the award pursuant to Georgia Arbitration Code, O.C.G.A. § 9-9-12, the attorney complied with the filing and service requirements of the Code, and the filing, service, and notice requirements for summary proceedings under Rule 6-501 of the AFD rules did not apply. Prince v. Bailey Davis, LLC, 306 Ga. App. 59, 701 S.E.2d 492 (2010).

Judgment entered on arbitration award not in conformity therewith. — As a trial court's confirmation of an arbitration award in favor of law clerks resulted in an award of back pay to the clerks that was to be implemented from the date of the confirmation order, it was not in conformity with the arbitration award, which required implementation from the date of the award. Fulton County v. Lord, 323 Ga. App. 384, 746 S.E.2d 188 (2013).

Renewal application to confirm arbitration award. — Corporation's original state court application to confirm an arbitration award was incapable of being renewed pursuant to O.C.G.A. § 9-2-61(a) because O.C.G.A. § 9-9-4(a)(1) required any application to the court under the Georgia Arbitration Code to be made in the superior court of the county where venue lies, and thus, the state court lacked subject matter jurisdiction over the corporation's original application; O.C.G.A. § 9-2-61(c) provided the only avenue by which the corporation could have resurrected the corporations' original void action under the renewal statute. Warehouseboy Trading, Inc. v. Gew Fitness, LLC, 316 Ga. App. 242, 729 S.E.2d 449 (2012).

Superior court erred in granting a motion to dismiss a corporation's renewal proceeding to confirm an arbitration award on the ground that the proceeding was barred by the one-year statute of limitation contained in O.C.G.A. § 9-9-12 because the application to confirm the award was a valid renewal action under O.C.G.A. § 9-2-61(c), thereby tolling the one-year statute of limitation; the corporation's original state court application to confirm the award was dismissed for lack of subject matter jurisdiction. Warehouseboy Trading, Inc. v. Gew Fitness, LLC, 316 Ga. App. 242, 729 S.E.2d 449 (2012).

Construction with the arbitration of fee disputes program of the State Bar of Georgia. — Rules of the Arbitration of Fee Disputes (AFD) program of the State Bar of Georgia authorize a party seeking enforcement of the arbitration award to elect between the filing and service procedures provided by the general arbitration laws of the state, i.e., the Georgia Arbitration Code, and the filing and service procedures for the more summary and expedited proceeding authorized by Rule 6-501 of the AFD program; accordingly, a party seeking to enforce the results of the arbitration over attorney fees may elect to file an application for confirmation of the award in the superior court pursuant to the Georgia Arbitration Code, O.C.G.A. § 9-9-12, and the party must file and serve the application in the same manner as a complaint in a civil action, O.C.G.A. § 9-9-4 and the 30-day deadline for objections set forth in Rule 6-501 of the Arbitration of Fee Disputes (AFD) program of the State Bar of Georgia is not applicable. Prince v. Bailey Davis, LLC, 306 Ga. App. 59, 701 S.E.2d 492 (2010).

Arbitration award to a client regarding a fee dispute. — Arbitration award to a client regarding a fee dispute with the client's lawyer, since the lawyer did not agree to be bound by the award, could not be confirmed under O.C.G.A. § 9-9-12 because the award was not binding under the Rules of the State Bar of Georgia as the client initiated an arbitration proceeding before the State Bar of Georgia and the award was the product of the State Bar's nonbinding arbitration rules and procedures. Farley v. Bothwell, 306 Ga. App. 801, 703 S.E.2d 397 (2010).

9-9-13. Vacation of award by court; application; grounds; rehearing; appeal of order.

Law reviews. — For article, "Comprehensive Arbitration of Domestic Relations Cases in Georgia," see 14 Ga. St. B.J. 20 (2008). For survey article on construction law, see 59 Mercer L. Rev. 55 (2007). For survey article on local government law, see 60 Mercer L. Rev. 263 (2008). For annual survey on construction law, see 61 Mercer L. Rev. 65 (2009).

For note, "Alive But Not Well: Manifest Disregard After Hall Street," see 44 Ga. L. Rev. 285 (2009).

JUDICIAL DECISIONS

Grounds for vacation of arbitration award.

Country club and a lessee could not contractually expand the grounds for a court to vacate an arbitration award in their lease, as such grounds were statutorily mandated pursuant to O.C.G.A. § 9-9-13(b) and were not subject to the parties' modification. Brookfield Country Club, Inc. v. St. James-Brookfield, LLC, 287 Ga. 408, 696 S.E.2d 663 (2010).

Procedural requirements.

In the absence of a transcript of an arbitration hearing, the superior court erred in vacating an arbitration award in favor of a plumbing company pursuant to O.C.G.A § 9-9-13(b)(5) because nothing in the record showed that the panel had the specific intent to disregard the appropriate law; further, the arguments provided by the company did not alter this result, as its supposition did not provide viable concrete evidence that the arbitration panel purposefully intended to disregard applicable law. ABCO Builders, Inc. v. Progressive Plumbing, Inc., 282 Ga. 308, 647 S.E.2d 574 (2007).

Decision within arbitrators' authority.

The trial court properly confirmed an arbitrator's award in a breach of contract action between a wastewater treatment company and a city as: (1) that part of the arbitrator's award which discussed the terms "maintenance" and "capital expenditures" was not inconsistent with the definitions contained in the contract; and (2) the award was based not only on the company's failure to make necessary repairs, but on the deterioration which resulted from that failure. Further, there was no requirement that the arbitrator's award include specific findings or reasons absent a request by the parties under O.C.G.A. § 9-9-39(a). Operations Mgmt. Int'l v. City of Forsyth, 288 Ga. App. 469, 654 S.E.2d 438 (2007).

Partiality of arbitrator.

Law client failed to show competent evidence regarding an alleged basis for vacatur of an arbitration award under O.C.G.A. § 9-9-13(b) of the Georgia Arbitration Code, O.C.G.A. § 9-9-1 et seq., since the clients' claim that the arbitrator did not disclose prior associations that amounted to "potential conflicts" was not supported by the record; further, "The Hennings Rules" were not placed upon the record, although the rules were relied upon, and there was no evidence that the arbitrator fell within the ambit of the Ga. Code Jud. Conduct Canon 3(E)(1). Phan v. Andre & Blaustein, LLP, 309 Ga. App. 191, 709 S.E.2d 863 (2011), cert. denied, No. S11C1339, 2012 Ga. LEXIS 61 (Ga. 2012).

Failure to show prejudice.

O.C.G.A. § 9-9-13(b)(2) did not provide a basis for vacating an arbitration award; while the comments made and questions asked by the arbitration panel's chairperson were aggressive, the record showed that the chairperson was merely trying to ferret out what happened between a subcontractor and the entities that had hired the subcontractor to work on a construction project. Airtab, Inc. v. Limbach Co., LLC, 295 Ga. App. 720, 673 S.E.2d 69 (2009).

Denial of motion to vacate was final judgment. — Trial court's order denying a company's motion to vacate a class determination arbitration award was a final one under O.C.G.A. § 5-6-34(a)(1). Once

the trial court concluded that the company did not comply with the limitation period set forth in O.C.G.A. § 9-9-13(a), nothing remained for the trial court's consideration; therefore, an appeal could not be considered interlocutory, and the company was not required to file an application for discretionary appeal as a prerequisite to the appellate court obtaining jurisdiction. Cypress Communs., Inc. v. Zacharias, 291 Ga. App. 790, 662 S.E.2d 857 (2008).

Vacation of award limited to statutory grounds.

Because parties' lease added to the grounds for vacatur provided in O.C.G.A. § 9-9-13(b), and because the record exhibited no overstepping of the arbitrator's authority or manifest disregard of the law, the trial court properly denied the owner's motion to vacate the award. Brookfield Country Club, Inc. v. St. James-Brookfield, LLC, 299 Ga. App. 614, 683 S.E.2d 40 (2009), aff'd, 287 Ga. 408, 696 S.E.2d 663 (2010).

Failure of arbitrator to make specific findings.

Fact that the arbitrators in a breach of contract action failed to provide any explanation for denying the subcontractor's request for attorney fees and interest was not a basis for vacating an arbitration award as the arbitrators were not required to enter written findings of fact or to explain the reasoning behind an award. Airtab, Inc. v. Limbach Co., LLC, 295 Ga. App. 720, 673 S.E.2d 69 (2009).

Failure of arbitrator to decide any and all disputes. — Final and definite arbitration award was not made because the arbitrator refused to consider the seller's counterclaim alleging that the buyer breached the buyer's obligations under certain promissory notes. The arbitration clauses in the parties' contracts required that "any and all disputes" between the parties be determined solely by arbitration; this included the dispute raised by the seller's counterclaim. Hansen & Hansen Enters. v. SCSJ Enters., 299 Ga. App. 469, 682 S.E.2d 652 (2009).

Manifest disregard of the law not shown.

A trial court properly denied a car dealership's motion to vacate an arbitration award in favor of a customer under O.C.G.A. § 9-9-13(b)(5). Whether or not the arbitrator correctly interpreted the Truth in Lending Act, the dealership did not show that the arbitrator manifestly disregarded the law to reach the result the arbitrator reached. Savannah Dodge, Inc. v. Bynes, 291 Ga. App. 281, 661 S.E.2d 660 (2008).

Subcontractor's assertion that the arbitrators in a breach of contract action ignored the law failed as the subcontractor failed to point to any evidence that the arbitrators ignored the subcontract or any controlling law. Airtab, Inc. v. Limbach Co., LLC, 295 Ga. App. 720, 673 S.E.2d 69 (2009).

Arbitrator's award was improperly vacated under O.C.G.A. § 9-9-13(b)(5) on grounds that the arbitrator manifestly disregarded the law of rescission as the arbitrator cited O.C.G.A. § 13-4-60 and applicable case law concerning rescission and applied that law to the circumstances of the case. Hansen & Hansen Enters. v. SCSJ Enters., 299 Ga. App. 469, 682 S.E.2d 652 (2009).

Arbitration award in favor of a home builder entitled the builder to summary judgment in the home buyers' action for breach of contract. The trial court erred in denying the builder's motion to confirm the award, because the buyers did not show that the arbitrator manifestly disregarded the applicable law or the parties' contract under O.C.G.A. § 9-9-13(b)(5). America's Home Place, Inc. v. Cassidy, 301 Ga. App. 233, 687 S.E.2d 254 (2009).

Trial court properly denied a motion by a law client under O.C.G.A. § 9-9-13(b)(5) seeking to vacate an arbitration award on the basis that the arbitrator disregarded and violated Henning's Rules regarding disclosure of potential conflicts as it was not shown that the arbitrator manifestly disregarded the proper law applicable to the case, which involved a dispute over legal fees owed by the client. Phan v. Andre & Blaustein, LLP, 309 Ga. App. 191, 709 S.E.2d 863 (2011), cert. denied, No. S11C1339, 2012 Ga. LEXIS 61 (Ga. 2012).

Arbitration award was affirmed because the arbitrator included with the arbitrator's award a detailed legal memorandum

in which the arbitrator considered the cases cited by the franchisees but distinguished the cases on the facts. The fact that the arbitrator rejected the franchisees' legal argument did not mean the arbitrator ignored the arguments. SCSJ Enters. v. Hansen & Hansen Enters., 319 Ga. App. 210, 734 S.E.2d 214 (2012).

Trial court erred in vacating an arbitration award in a product liability action because the buyer failed to carry the burden of establishing that the subjective prong of the test for manifest disregard was met as nothing in the arbitration order reflected that the arbitrator appreciated that apportionment of damages was improper if strict liability applied but decided to ignore that principle. Patterson v. Long, 321 Ga. App. 157, 741 S.E.2d 242 (2013).

Dismissal of law clerks' motion to confirm an arbitration award in the clerks' favor on the clerks' group-pay grievance against a county due to alleged pay disparity was not warranted as the back pay award was not barred by the doctrine of sovereign immunity; accordingly, there was no manifest disregard of the law by the arbitrator. Fulton County v. Lord, 323 Ga. App. 384, 746 S.E.2d 188 (2013).

Trial court properly denied plaintiffs' motion to vacate an arbitration award in a suit asserting breach of contract, breach of fiduciary duty, fraud, and other claims on the ground that the arbitrator manifestly disregarded the law, because that ground, pursuant to O.C.G.A. § 9-9-13(b)(5), only applied to claims filed after July 1, 2003, and the action was commenced in 2002. Ansley Marine Constr., Inc. v. Swanberg, 290 Ga. App. 388, 660 S.E.2d 6 (2008), cert. denied, 2008 LEXIS 673 (Ga. 2008).

9-9-14. Modification of award by court; application; grounds; subsequent confirmation of award.

Law reviews. — For article, "Comprehensive Arbitration of Domestic Relations Cases in Georgia," see 14 Ga. St. B.J. 20 (2008).

JUDICIAL DECISIONS

Modification or striking of award not required.

The trial court properly confirmed an arbitrator's award in a breach of contract action between a wastewater treatment company and a city as: (1) that part of the arbitrator's award which discussed the terms "maintenance" and "capital expenditures" was not inconsistent with the definitions contained in the contract; and (2) the award was based not only on the company's failure to make necessary repairs, but on the deterioration which resulted from that failure. Further, there was no requirement that the arbitrator's award include specific findings or reasons absent a request by the parties under O.C.G.A. § 9-9-39(a). Operations Mgmt. Int'l v. City of Forsyth, 288 Ga. App. 469, 654 S.E.2d 438 (2007).

Trial court did not err by vacating rather than modifying the arbitration order in a products liability action because any increase in the award because of an alleged mistake of law, as sought by the buyer, would have constituted a substantive change, not a mere change in form. Patterson v. Long, 321 Ga. App. 157, 741 S.E.2d 242 (2013).

Modification did not affect the merits of arbitrator's finding. — The trial court's modification of an arbitrator's award did not affect the merits of the arbitrators' finding as to a patient's liability to a medical provider for services rendered. Lowe v. Ctr. Neurology Assocs., P.C., 288 Ga. App. 166, 653 S.E.2d 318 (2007), cert. denied, 2008 Ga. LEXIS 325 (Ga. 2008).

Modification of an arbitration award was warranted under O.C.G.A. § 9-9-14(b)(2) since a bankruptcy court limited the purpose of the arbitration to determining the disputed amount of a bankruptcy debtor's underlying state law claim against sellers of a modular home and adjustment of the allowed claim of the sellers to include any amounts awarded

by the arbitrator, and the arbitrator exceeded the scope of the court's instructions by providing a 90-day period for the debtor to pay the full amount so the debtor could obtain permanent financing. Clark v. Palm Harbor Homes, Inc. (In re Clark), 411 B.R. 507 (Bankr. S.D. Ga. 2009).

Request for modification untimely. — As a county did not request modification of an arbitrator's award of back pay to county employees until eight months after the award was issued, and nearly one month after the award was confirmed, the county could not circumvent the statute of limitation governing arbitration awards by claiming on appeal that the award should have been modified. Fulton County v. Lord, 323 Ga. App. 384, 746 S.E.2d 188 (2013).

9-9-15. Judgment on award.

JUDICIAL DECISIONS

Judgment entered on arbitration award not in conformity therewith. — As a trial court's confirmation of an arbitration award in favor of law clerks resulted in an award of back pay to the clerks that was to be implemented from the date of the confirmation order, the award was not in conformity with the arbitration award, which required implementation from the date of the award. Fulton County v. Lord, 323 Ga. App. 384, 746 S.E.2d 188 (2013).

Postjudgment interest awarded. — Trial court properly awarded postjudgment interest after the court confirmed an arbitration award; once confirmed, the arbitration was treated like all other judgments, and under O.C.G.A. § 7-4-12(a), all judgments bore annual interest on the principal amount recovered. Airtab, Inc. v. Limbach Co., LLC, 295 Ga. App. 720, 673 S.E.2d 69 (2009).

9-9-16. Appeals authorized.

JUDICIAL DECISIONS

Cited in Torres v. Piedmont Builders, Inc., 300 Ga. App. 872, 686 S.E.2d 464 (2009).

Part 2

International Commercial Arbitration Code

Effective date. — This part became effective July 1, 2012.

Editor's notes. — Ga. L. 2012, p. 961, § 1/SB 383, effective July 1, 2012, repealed the Code sections formerly codified at this part and enacted the current part. The former part consisted of Code Sections 9-9-30 through 9-9-43, relating to international transactions, and was based on Code 1981, §§ 9-9-30 through 9-9-43, enacted by Ga. L. 1988, p. 903, § 2.

Ga. L. 2012, p. 961, § 2/SB 383, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to international arbitration agreements entered into on and after such date. This Act shall not apply to any international arbitration agreements entered into prior to July 1, 2012, to which the provisions of the former Part 2 of Article 1 of Chapter 9 of Title 9 shall apply."

Law reviews. — For article on the 2012 enactment of this part, see 29 Ga. St. U.L. Rev. 334 (2012).

9-9-20. Short title; statement of purpose.

(a) This part shall be known and may be cited as the "Georgia International Commercial Arbitration Code."

(b) The purpose of this part is to encourage international commercial arbitration in this state, to enforce arbitration agreements and arbitration awards, to facilitate prompt and efficient arbitration proceedings consistent with this part, and to provide a conducive environment for international business and trade. (Code 1981, § 9-9-20, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2A Am. Jur. Pleading and Practice Forms, Arbitration and Award, § 81.

ALR. — Refusal to enforce foreign arbitration awards on public policy grounds, 144 ALR Fed. 481.

9-9-21. Applicability.

(a) This part shall apply to international commercial arbitration, subject to any agreement in force between the United States and any other country.

(b) The provisions of this part, except for Code Sections 9-9-29 and 9-9-30, subsections (f) through (h) of Code Section 9-9-38, and Code Sections 9-9-39, 9-9-57, and 9-9-58, shall apply only if the place of arbitration is in this state.

(c) An arbitration shall be considered international if:

(1) The parties to an arbitration agreement have their places of business in different countries at the time of the conclusion of such arbitration agreement;

(2) One of the following places is situated outside the country in which the parties have their places of business:

(A) The place of arbitration, if determined in or pursuant to the arbitration agreement; or

(B) Any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

(3) The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(d) For the purposes of subsection (c) of this Code section:

(1) If a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement; and

(2) If a party does not have a place of business, reference is to be made to such party's habitual residence.

(e) This part shall not affect any other law of this state by virtue of which certain disputes shall not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this part. (Code 1981, § 9-9-21, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-22. Definitions.

(a) As used in this part, the term:

(1) "Arbitration" means any arbitration, whether or not administered by a permanent arbitral institution.

(2) "Arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes that have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not, and may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) "Arbitration award" means a decision of an arbitration tribunal on the substance of a dispute submitted to it and shall include an interim, interlocutory, or partial award.

(4) "Arbitration tribunal" means a sole arbitrator or a panel of arbitrators.

(b)(1) Where a provision of this part, except Code Section 9-9-50, leaves the parties free to determine a certain issue, such freedom shall include the right of the parties to authorize a third party, including an institution, to make that determination.

(2) Where a provision of this part refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement shall include any arbitration rule referred to in such agreement.

(3) Where a provision of this part, other than in paragraph (1) of Code Section 9-9-47 and paragraph (1) of subsection (b) of Code Section 9-9-54, refers to a claim, it shall also apply to a counterclaim, and where it refers to a defense, it shall also apply to a defense to such counterclaim. (Code 1981, § 9-9-22, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-23. Interpretation.

(a) In the interpretation of this part, regard shall be given to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(b) Questions concerning matters governed by this part which are not expressly settled in it are to be settled in conformity with the general principles on which this part is based. (Code 1981, § 9-9-23, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-24. Receipt of written communications.

(a) Unless otherwise agreed by the parties:

(1) Any written communication shall be deemed to have been received if it is delivered to the addressee personally or if it is delivered at his or her place of business, habitual residence, or mailing address; if none of these can be found after making a reasonable inquiry, a written communication shall be deemed to have been received if it is sent to the addressee's last known place of business, habitual residence, or mailing address by registered mail or any other means which provides a record of the attempt to deliver it; and

(2) Communications shall be deemed to have been received on the day it is delivered.

(b) The provisions of this Code section shall not apply to communications in court proceedings. (Code 1981, § 9-9-24, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-25. Waiver of right to object to violations of arbitration agreement.

A party who knows that any provision of this part from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without objecting to such noncompliance without undue delay or, if a time limit is provided therefor, within such period of time, shall be deemed to have waived the right to object. (Code 1981, § 9-9-25, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-26. Judicial intervention and enforcement.

In matters governed by this part, no court shall intervene except where provided in this part. If the controversy is within the scope of this part, the arbitration agreement shall be enforced by the courts of this state in accordance with this part without regard to the justiciable character of the controversy. (Code 1981, § 9-9-26, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-27. County where agreement to be enforced.

The functions referred to in subsections (c) and (d) of Code Section 9-9-32, subsection (c) of Code Section 9-9-34, Code Section 9-9-35,

paragraph (3) of Code Section 9-9-37, Code Section 9-9-49, and subsection (b) of Code Section 9-9-56 shall be performed by the superior court in the county agreed upon by the parties. Barring such agreement, these functions shall be performed by the superior court:

(1) In any county where any portion of the hearing has been conducted;

(2) If no portion of the hearing has been conducted in this state, in the county where any party resides or does business; or

(3) If there is no such county, in any county. (Code 1981, § 9-9-27, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-28. Arbitration agreements to be in writing; definitions.

(a) All arbitration agreements shall be in writing.

(b) A written arbitration agreement means that its contents are recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(c)(1) As used in this subsection, the term:

(A) "Data message" means information generated, sent, received or stored by electronic, magnetic, optical, or similar means, including, but not limited to, electronic data interchange (EDI), e-mail, telegram, telex, or telecopy.

(B) "Electronic communication" means any communication that the parties make by means of data messages.

(2) The requirement that an arbitration agreement be in writing may be met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

(d) An arbitration agreement shall be deemed to be in writing if it is contained in an exchange of statements of claim and defense in which the existence of an arbitration agreement is alleged by one party and not denied by the other.

(e) The reference in a contract to any document containing an arbitration clause shall constitute an arbitration agreement in writing, provided that the reference is such as to make that clause a part of the contract. (Code 1981, § 9-9-28, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-29. Arbitration referrals.

(a) A court before which a civil action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not

later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative, or incapable of being performed.

(b) Where an action referred to in subsection (a) of this Code section has been brought, arbitral proceedings may nevertheless be commenced or continued, and an arbitration award may be made, while the action is pending before the court. (Code 1981, § 9-9-29, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-30. Interim measures of protection.

Before or during arbitral proceedings, a party may request from a court an interim measure of protection, and a court may grant such measure, and such request shall not be deemed to be incompatible with an arbitration agreement. (Code 1981, § 9-9-30, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-31. Number of arbitrators.

The parties shall be free to determine the number of arbitrators, and if no determination is stated, the number of arbitrators shall be one. (Code 1981, § 9-9-31, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-32. Appointment of arbitrators; immunity from liability.

(a) No person shall be precluded by reason of nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(b) The parties shall be free to agree on a procedure to appoint the arbitrator or arbitrators, subject to the provisions of subsections (d) and (e) of this Code section.

(c) If the parties do not agree on the procedure to appoint the arbitrator or arbitrators:

(1) In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made, upon request of a party, by the court specified in Code Section 9-9-27; or

(2) In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator within 30 days, the arbitrator shall be appointed, upon request of a party, by the court specified in Code Section 9-9-27.

(d) Where, under an appointment procedure agreed upon by the parties:

(1) A party fails to act as required under such procedure;

(2) The parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure; or

(3) A third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court specified in Code Section 9-9-27 to take the necessary measure, unless the arbitration agreement on the appointment procedure provides other means for securing the appointment.

(e) A decision on a matter entrusted by subsections (c) or (d) of this Code section to the court specified in Code Section 9-9-27 shall not be subject to appeal. The court, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the arbitration agreement and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

(f) An arbitrator shall not be liable for:

(1) Anything done or omitted in the discharge or purported discharge of arbitral functions, unless the act or omission is shown to have been in bad faith; or

(2) Any mistake of law, fact, or procedure made in the course of arbitration proceedings or in the making of an arbitration award.

(g) Subsection (f) of this Code section shall apply to an employee or agent of an arbitrator and to an appointing authority, arbitral institution, or person designated or requested by the parties to appoint or nominate an arbitrator or provide other administrative services in support of the arbitration. (Code 1981, § 9-9-32, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-33. Arbitrator disclosure requirements; challenge of arbitrator for doubts as to impartiality or independence.

(a) When a person is approached in connection with the possible appointment of such person as an arbitrator, such person shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of appointment and throughout the arbitral proceedings, shall without delay

disclose any such circumstances to the parties unless they have already been informed of them by the arbitrator.

(b) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by the party, or in whose appointment the party has participated, only for reasons of which the party becomes aware after the appointment has been made. (Code 1981, § 9-9-33, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-34. Procedure for challenging arbitrator.

(a) The parties shall be free to agree on a procedure for challenging an arbitrator, subject to the provisions of subsection (c) of this Code section.

(b) If the parties fail to agree on a procedure for challenging an arbitrator, a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitration tribunal or after becoming aware of any circumstance referred to in subsection (b) of Code Section 9-9-33, send a written statement of the reasons for the challenge to the arbitration tribunal. Unless the challenged arbitrator withdraws from office or the other party agrees to the challenge, the arbitration tribunal shall decide on the challenge.

(c) If a challenge under the procedure set forth in subsection (b) of this Code section is not successful, within 30 days after having received notice of the decision rejecting the challenge, the challenging party may request that the court specified in Code Section 9-9-27 decide on the challenge, which decision shall not be subject to appeal; while such a request is pending, the arbitration tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an arbitration award. (Code 1981, § 9-9-34, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-35. Inability of arbitrator to carry out or perform functions; termination of mandate.

(a) If an arbitrator becomes de jure or de facto unable to perform his or her functions or for other reasons fails to act without undue delay, the arbitrator's mandate terminates if he or she withdraws from office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request that the court specified in Code Section 9-9-27 decide on the termination of the mandate, which decision shall not be subject to appeal.

(b) If, under this Code section or subsection (b) of Code Section 9-9-34, an arbitrator withdraws from office or a party agrees to the termination of the mandate of an arbitrator, this shall not imply acceptance of the validity of any ground referred to in this Code section or subsection (b) of Code Section 9-9-33. (Code 1981, § 9-9-35, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-36. Appointment of substitute arbitrator.

Where the mandate of an arbitrator terminates under Code Section 9-9-34 or 9-9-35 or because of withdrawal from office for any other reason or because of the revocation of the arbitrator's mandate by agreement of the parties or in any other case of termination of the arbitrator's mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. (Code 1981, § 9-9-36, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-37. Disputes as to jurisdiction.

Unless otherwise agreed by the parties:

(1) The arbitration tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitration tribunal that the contract is null and void shall not thereby invalidate the arbitration clause;

(2) A plea that the arbitration tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense. A party shall not be precluded from raising such a plea by the fact that the party has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitration tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitration tribunal may, in either case, admit a later plea if it considers the delay justified; and

(3) The arbitration tribunal may rule on a plea referred to in paragraph (2) of this Code section either as a preliminary question or in an arbitration award on the merits. If the arbitration tribunal rules as a preliminary question that it has jurisdiction or only partial jurisdiction, within 30 days after having received notice of such ruling and subject to the permission of the arbitration tribunal, any party may request that the court specified in Code Section 9-9-27

decide the matter, which decision shall not be subject to appeal; while such a request is pending, the arbitration tribunal may continue the arbitral proceedings and make an arbitration award. (Code 1981, § 9-9-37, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-38. Interim measures.

(a) Unless otherwise agreed by the parties, the arbitration tribunal may, at the request of a party, grant interim measures as it deems appropriate.

(b) The arbitration tribunal may modify, suspend, or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitration tribunal's own initiative.

(c) The arbitration tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(d) The arbitration tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(e) If a measure ordered under subsection (a) of this Code section proves to have been unjustified from the outset, the party which obtained its enforcement may be obliged to compensate the other party for damage resulting from the enforcement of such measure or from its providing security in order to avoid enforcement. This claim may be put forward in the pending arbitral proceedings.

(f) An interim measure issued by an arbitration tribunal shall be recognized as binding and, unless otherwise provided by the arbitration tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of Code Section 9-9-39.

(g) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension, or modification of that interim measure.

(h) Where recognition or enforcement of an interim measure is sought in a court of this state, such court may order the requesting party to provide appropriate security if the arbitration tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties. (Code 1981, § 9-9-38, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-39. When recognition or enforcement of interim measure may be refused.

(a) Recognition or enforcement of an interim measure may be refused only:

(1) At the request of the party against whom it is invoked if the court is satisfied that:

(A) Such refusal is warranted on the grounds set forth in subparagraphs (a)(1)(A) through (a)(1)(D) of Code Section 9-9-58;

(B) The arbitration tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitration tribunal has not been complied with; or

(C) The interim measure has been terminated or suspended by the arbitration tribunal or, where so empowered, by the court of the state in which the arbitration takes place or under the law of which that interim measure was granted; or

(2) If the court finds that:

(A) The interim measure is incompatible with the powers conferred upon the court, unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(B) Any of the grounds set forth in subparagraph (a)(2)(A) or (a)(2)(B) of Code Section 9-9-58 shall apply to the recognition and enforcement of the interim measure.

(b) Any determination made by the court on any ground in subsection (a) of this Code section shall be effective only for the purposes of the application to recognize and enforce the interim measure. Where recognition or enforcement is sought, the court shall not undertake a review of the substance of the interim measure in determining any ground specified in subsection (a) of this Code section. (Code 1981, § 9-9-39, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-40. Treatment of parties.

The parties shall be treated with equality, and each party shall be given a full opportunity of presenting its case. (Code 1981, § 9-9-40, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-41. Procedure to be followed by arbitration tribunal.

(a) Subject to the provisions of this part, the parties shall be free to agree on the procedure to be followed by the arbitration tribunal in conducting the proceedings.

(b) If the parties fail to agree on the procedure to be followed by the arbitration tribunal in conducting proceedings, the arbitration tribunal may, subject to the provisions of this part, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitration tribunal includes the power to determine the admissibility, relevance, materiality, and weight of any evidence. (Code 1981, § 9-9-41, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-42. Place of arbitration.

(a) The parties shall be free to agree on the place of arbitration; provided, however, that failing such agreement, the place of arbitration shall be determined by the arbitration tribunal having regard to the circumstances of the case, including the convenience of the parties.

(b) Notwithstanding the provisions of subsection (a) of this Code section, the arbitration tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts, or the parties, or for inspection of goods, other property, or documents. (Code 1981, § 9-9-42, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-43. Date of commencement of arbitral proceedings.

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. (Code 1981, § 9-9-43, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-44. Languages to be used in arbitral proceedings; translation of documentary evidence.

(a) The parties shall be free to agree on the language or languages to be used in the arbitral proceedings; provided, however, that failing such agreement, the arbitration tribunal shall determine the language or languages to be used in the proceedings. Such agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing, and any arbitration award, decision, or other communication by the arbitration tribunal.

(b) The arbitration tribunal may order that any documentary evidence be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitration tribunal. (Code 1981, § 9-9-44, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-45. Facts supporting claim; amendment or supplementing of claim.

(a) Within the period of time agreed by the parties or determined by the arbitration tribunal, the claimant shall state the facts supporting his or her claim, the points at issue, and the relief or remedy sought, and the respondent shall state his or her defense in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(b) Unless otherwise agreed by the parties, either party may amend or supplement his or her claim or defense during the course of the arbitral proceedings, unless the arbitration tribunal considers it inappropriate to allow such amendment having regard to the delay in making it. (Code 1981, § 9-9-45, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-46. How proceedings to be conducted; oral hearings; notice; consolidation of proceedings or hearings.

(a) Subject to any contrary agreement by the parties, the arbitration tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials; provided, however, that unless the parties have agreed that no hearings shall be held, the arbitration tribunal shall hold hearings at an appropriate stage of the proceedings, if requested by a party.

(b) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitration tribunal for the purposes of inspection of goods, other property, or documents.

(c) All statements, documents, or other information supplied to the arbitration tribunal by one party shall be communicated to the other party. Any expert report or evidentiary document on which the arbitration tribunal may rely in making its decision shall be communicated to the parties.

(d) Unless the parties agree to confer such power on the tribunal, the tribunal shall not have the power to order consolidation of proceedings or concurrent hearings; provided, however, that the parties shall be free to agree:

(1) That the arbitral proceedings shall be consolidated with other arbitral proceedings; or

(2) That concurrent hearings shall be held, on such terms as may be agreed. (Code 1981, § 9-9-46, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-47. Effects of failure to state facts supporting claim, failure to put forward statement of defense, or failure to appear at hearing or to produce documentary evidence.

Unless otherwise agreed by the parties, if, without showing sufficient cause:

(1) The claimant fails to communicate his or her statement of claim in accordance with subsection (a) of Code Section 9-9-45, the arbitration tribunal shall terminate the proceedings;

(2) The respondent fails to communicate his or her statement of defense in accordance with subsection (a) of Code Section 9-9-45, the arbitration tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations; and

(3) Any party fails to appear at a hearing or to produce documentary evidence, the arbitration tribunal may continue the proceedings and make the arbitration award on the evidence before it. (Code 1981, § 9-9-47, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-48. Appointment of experts.

(a) Unless otherwise agreed by the parties, the arbitration tribunal:

(1) May appoint one or more experts to report to it on specific issues to be determined by the arbitration tribunal; and

(2) May require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods, or other property for the expert's inspection.

(b) Unless otherwise agreed by the parties, if a party requests or if the arbitration tribunal considers it necessary, the expert shall, after delivery of the expert's written or oral report, participate in a hearing where the parties have the opportunity to put questions to the expert and to present expert witnesses in order to testify on the points at issue. (Code 1981, § 9-9-48, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-49. Subpoenas for witnesses and other evidence; compensation of witnesses.

(a) The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents, and

other evidence. Subpoenas shall be served and, upon application to the court specified in Code Section 9-9-27 by a party or the arbitrators, enforced in the same manner provided by law for the service and enforcement of subpoenas in a civil action.

(b) Notices to produce books, writings, and other documents or tangible things, depositions, and other discovery may be used in the arbitration according to procedures established by the arbitrators.

(c) A party shall have the opportunity to obtain a list of witnesses and to examine and copy documents relevant to the arbitration.

(d) Witnesses shall be compensated in the same amount and manner set forth in Title 24. (Code 1981, § 9-9-49, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-50. Rules applicable to disputes.

(a) The arbitration tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of that state and not to its conflict of laws rules.

(b) Failing any designation by the parties, the arbitration tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(c) The arbitration tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

(d) In all cases, the arbitration tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction. (Code 1981, § 9-9-50, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-51. Decision-making where more than one arbitrator.

In arbitral proceedings with more than one arbitrator, any decision of the arbitration tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members; provided, however, that questions of procedure may be decided by a presiding arbitrator, if authorized by the parties or all members of the arbitration tribunal. (Code 1981, § 9-9-51, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-52. Settlement; arbitration award on agreed terms.

(a) If, during arbitral proceedings, the parties settle the dispute, the arbitration tribunal shall terminate the proceedings and, if requested

by the parties and not objected to by the arbitration tribunal, record the settlement in the form of an arbitration award on agreed terms.

(b) An arbitration award on agreed terms shall be made in accordance with the provisions of Code Section 9-9-53 and shall state that it is an arbitration award. Such an arbitration award shall have the same status and effect as any other arbitration award on the merits of the case. (Code 1981, § 9-9-52, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-53. Arbitration award.

(a) An arbitration award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitration tribunal shall suffice, provided that the reason for any omitted signature is stated.

(b) The arbitration award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the arbitration award is an arbitration award on agreed terms pursuant to Code Section 9-9-52.

(c) The arbitration award shall state its date and the place of arbitration as determined in accordance with subsection (a) of Code Section 9-9-42. The arbitration award shall be deemed to have been made at that place.

(d) After the arbitration award is made, a copy signed by the arbitrators in accordance with subsection (a) of this Code section shall be delivered to each party.

(e) The arbitrators may award reasonable fees and expenses actually incurred, including, without limitation, fees and expenses of legal counsel, to any party to the arbitration and shall allocate the costs of the arbitration among the parties as it determines appropriate. (Code 1981, § 9-9-53, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 9-9-39 are included in the annotations for this Code section.

Degree of specificity required in written statement of award. — There is no requirement that the arbitrator's award include specific findings or reasons absent a request by the parties under subsection (a) of former O.C.G.A. § 9-9-39, or that the award expressly address each and every issue and collateral issue arising in an arbitration. Trend-Pak of Atlanta, Inc. v. Arbor Commercial Div., Inc., 197 Ga. App. 137, 397 S.E.2d 592 (1990) (decided under former O.C.G.A. § 9-9-39).

Specific findings not required absent request. — Trial court properly confirmed an arbitrator's award in a breach of contract action between a wastewater treatment company and a city as: (1) that part of the arbitrator's award which dis-

cussed the terms "maintenance" and "capital expenditures" was not inconsistent with the definitions contained in the contract; and (2) the award was based not only on the company's failure to make necessary repairs, but on the deterioration which resulted from that failure. Further, there was no requirement that the arbitrator's award include specific findings or reasons absent a request by the parties under former O.C.G.A. § 9-9-39(a). Operations Mgmt. Int'l v. City of Forsyth, 288 Ga. App. 469, 654 S.E.2d 438 (2007) (decided under former O.C.G.A. § 9-9-39).

9-9-54. Termination of arbitral proceedings.

(a) The arbitral proceedings shall be terminated by the final arbitration award or by an order of the arbitration tribunal in accordance with subsection (b) of this Code section.

(b) The arbitration tribunal shall issue an order for the termination of the arbitral proceedings when:

(1) The claimant withdraws his or her claim, unless the respondent objects thereto and the arbitration tribunal recognizes a legitimate interest by the respondent in obtaining a final settlement of the dispute;

(2) The parties agree on the termination of the proceedings; or

(3) The arbitration tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(c) The mandate of the arbitration tribunal shall terminate with the termination of the arbitral proceedings, subject to the provisions of Code Section 9-9-55 and subsection (d) of Code Section 9-9-56. (Code 1981, § 9-9-54, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-55. Correction or interpretation of arbitration award; additional arbitration awards; extension of time for correction, interpretation, or additional award.

(a)(1) Within 30 days of receipt of the arbitration award, unless another period of time has been agreed upon by the parties:

(A) A party, with notice to the other party, may request the arbitration tribunal to correct in the arbitration award any errors in computation, any clerical or typographical errors, or any errors of similar nature; and

(B) If agreed by the parties, a party, with notice to the other party, may request the arbitration tribunal to give an interpretation of a specific point or part of the arbitration award.

(2) If the arbitration tribunal considers any request under paragraph (1) of this subsection to be justified, it shall make the correction

or give the interpretation within 30 days of receipt of the request. The interpretation shall form part of the arbitration award.

(b) The arbitration tribunal may correct any error of the type referred to in subparagraph (a)(1)(A) of this Code section on its own initiative within 30 days of the date of the arbitration award.

(c) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within 30 days of receipt of the arbitration award, the arbitration tribunal to make an additional award as to claims presented in the arbitration proceedings but omitted from the arbitration award. If the arbitration tribunal considers such request to be justified, it shall make the additional award within 60 days of receipt of the request.

(d) The arbitration tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation, or an additional award under subsection (a) or (c) of this Code section.

(e) The provisions of Code Section 9-9-53 shall apply to a correction or interpretation of the arbitration award or to an additional award. (Code 1981, § 9-9-55, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-56. Recourse against arbitration award; criteria for setting aside award; time for making application to set aside.

(a) Recourse to a court against an arbitration award may be made only by an application for setting aside in accordance with subsections (b) and (c) of this Code section.

(b) An arbitration award may be set aside by the court specified in Code Section 9-9-27 only if:

(1) The party making the application furnishes proof that:

(A) A party to the arbitration agreement referred to in Code Section 9-9-28 was under some incapacity; or that said arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this state;

(B) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his or her case;

(C) The arbitration award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only

that part of the arbitration award which contains decisions on matters not submitted to arbitration may be set aside; or

(D) The composition of the arbitration tribunal or the arbitral procedure was not in accordance with the arbitration agreement of the parties, unless such arbitration agreement was in conflict with a provision of this part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this part; or

(2) The court finds that:

(A) The subject matter of the dispute is not capable of settlement by arbitration under the law of the United States; or

(B) The arbitration award is in conflict with the public policy of the United States.

(c) An application for setting aside an arbitration award may not be made after three months have elapsed from the date on which the party making that application had received the arbitration award or, if a request had been made under Code Section 9-9-55, from the date on which that request had been disposed of by the arbitration tribunal.

(d) The court, when asked to set aside an arbitration award, may, where appropriate and requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitration tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitration tribunal's opinion will eliminate the grounds for setting aside.

(e) Where none of the parties is domiciled or has its place of business in this state, they may, by written agreement referencing this subsection, limit any of the grounds for recourse against the arbitration award under this Code section, with the exception of paragraph (2) of subsection (b) of this Code section. (Code 1981, § 9-9-56, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

9-9-57. Arbitration award recognized as binding; enforcement.

(a) An arbitration award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this Code section and of Code Section 9-9-58.

(b) The party relying on an arbitration award or applying for its enforcement shall supply the original arbitration award or a copy thereof. The court may request the party to supply a translation of the arbitration award. (Code 1981, § 9-9-57, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2A Am. Jur. Pleading and Practice Forms, Arbitration and Award, § 81.

ALR. — Refusal to enforce foreign arbitration awards on public policy grounds, 144 ALR Fed. 481.

9-9-58. Grounds for refusing recognition or enforcement of arbitration award.

(a) Recognition or enforcement of an arbitration award, irrespective of the country in which it was made, may be refused only:

(1) At the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(A) A party to the arbitration agreement referred to in Code Section 9-9-28 was under some incapacity; or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the arbitration award was made;

(B) The party against whom the arbitration award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his or her case;

(C) The arbitration award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the arbitration award which contains decisions on matters submitted to arbitration may be recognized and enforced;

(D) The composition of the arbitration tribunal or the arbitral procedure was not in accordance with the arbitration agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(E) The arbitration award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that arbitration award was made; or

(2) If the court finds that:

(A) The subject matter of the dispute is not capable of settlement by arbitration under the law of the United States; or

(B) The recognition or enforcement of the arbitration award would be contrary to the public policy of the United States.

(b) If an application for setting aside or suspension of an arbitration award has been made to a court referred to in subparagraph (a)(1)(E) of this Code section, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the arbitration award, order the other party to provide appropriate security. (Code 1981, § 9-9-58, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2A Am. Jur. Pleading and Practice Forms, Arbitration and Award, § 81.

ALR. — Refusal to enforce foreign arbitration awards on public policy grounds, 144 ALR Fed. 481.

9-9-59. Appeal of final judgment.

Any judgment considered a final judgment under this part may be appealed pursuant to Chapter 6 of Title 5. (Code 1981, § 9-9-59, enacted by Ga. L. 2012, p. 961, § 1/SB 383.)

ARTICLE 2

MEDICAL MALPRACTICE

Law reviews. — For article, "State of Emergency: Why Georgia's Standard of Care in Emergency Rooms is Harmful to Your Health," see 45 Ga. L. Rev. 275 (2010).

9-9-60. "Medical malpractice claim" defined.

Law reviews. — For article, "State of Emergency: Why Georgia's Standard of Care in Emergency Rooms is Harmful to Your Health," see 45 Ga. L. Rev. 275 (2010).

9-9-62. Petition for arbitration; arbitration order and appointment of referee; conditions precedent to enforceability.

JUDICIAL DECISIONS

Preemption by federal Arbitration Act. — O.C.G.A. § 9-9-62 singles out a specific class of arbitration agreement and restricts the enforcement thereof counter to the liberal federal policy favoring arbitration agreements; further, a defense based on § 9-9-62 is not a generally applicable contract defense. It follows that § 9-9-62 is preempted by the federal Arbitration Act. Triad Health Mgmt. of Ga., III, LLC v. Johnson, 298 Ga. App. 204, 679 S.E.2d 785 (2009), cert. denied, No. S09C1680, 2009 Ga. LEXIS 779 (Ga. 2009).

In a case in which a resident sued a care facility alleging negligence and the care facility moved to dismiss and compel arbitration of the resident's allegations pursu-

ant to an arbitration clause contained in the Resident and Facility Agreement signed by the resident's son, the resident unsuccessfully argued that O.C.G.A. § 9-9-62 prohibited arbitration in medical malpractice cases where the arbitration agreements were signed before the claims arose or when a party was not represented by counsel, the Federal Arbitration Act (FAA) applied, and through the language in 9 U.S.C. § 2, the FAA preempted O.C.G.A. § 9-9-62. Holyfield v. GGNSC Atlanta, LLC, No. 1:08-CV-2669-RWS, 2009 U.S. Dist. LEXIS 29567 (N.D. Ga. Apr. 8, 2009).

Motion to compel arbitration is not equitable in nature. — Approval by the superior courts contemplated by O.C.G.A. § 9-9-62 is not a requirement applicable to contracts generally or even arbitration agreements generally, nor has the legislature deemed that motions to compel arbitration be treated as equitable in nature. Thus, there was no merit to an argument that § 9-9-62 evidenced the legislature's intent that enforcement of a arbitration agreement fall within the superior court's equity jurisdiction and that an arbitration agreement could not be enforced through a motion in the state court to compel arbitration. Triad Health Mgmt. of Ga., III, LLC v. Johnson, 298 Ga. App. 204, 679 S.E.2d 785 (2009), cert. denied, No. S09C1680, 2009 Ga. LEXIS 779 (Ga. 2009).

9-9-80. Finality of findings absent appeal; appeals to superior courts; transmittal of record; when findings set aside; disposition of case; supersedeas.

JUDICIAL DECISIONS

Waiver of right to challenge error. — In an arbitration matter between a patient and a medical provider, because the arbitrators failed to find that the provider could not recover from the patient, but instead could recover only against an insurer, and only to the extent that the patient's health benefits covered the services rendered, the patient waived any right to challenge any alleged error by the arbitrators. Lowe v. Ctr. Neurology Assocs., P.C., 288 Ga. App. 166, 653 S.E.2d 318 (2007), cert. denied, 2008 Ga. LEXIS 325 (Ga. 2008).

CHAPTER 10

CIVIL PRACTICE AND PROCEDURE GENERALLY

Article 1

General Provisions

Article 4

Personal Jurisdiction over Nonresidents

Article 7

Continuances

ARTICLE 1

GENERAL PROVISIONS

9-10-6. Juror's private knowledge.

A juror shall not act on his or her private knowledge respecting the facts, witnesses, or parties. (Civil Code 1895, § 5337; Civil Code 1910, § 5932; Code 1933, § 110-108; Ga. L. 2011, p. 99, § 9/HB 24.)

The 2011 amendment, effective January 1, 2013, inserted "or her" near the beginning and deleted "unless sworn and examined as a witness in the case" following "parties" at the end. See editor's note for applicability.

Cross references. — Juror as witness, § 24-6-606.

Editor's notes. — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

9-10-7. Expression by judge of opinion in case reversible error.

JUDICIAL DECISIONS

ANALYSIS

General Considerations

Pertinent remarks made by a trial court in discussing the admissibility of evidence or explaining the court's rulings do not constitute prohibited expressions of opinion. Morrison v. Morrison, 282 Ga. 866, 655 S.E.2d 571 (2008).

Cited in Davison v. Hines, 291 Ga. 434, 729 S.E.2d 330 (2012).

Application

Judge's rulings on objections or sua sponte efforts by trial court to control trial. — In a trial for undue influence and revocation of a will brought by one sibling against another, the trial judge's remarks in stopping the plaintiff's counsel from questioning a witness about a provision in a previous will of the testator's, which was not carried over into the will at issue in the case, were not directed to the evidence or to the credibility of witnesses, but to the conduct of the cross-examination by the plaintiff's counsel; they were merely rulings on objections or sua sponte efforts by the trial court to control the trial. Morrison v. Morrison, 282 Ga. 866, 655 S.E.2d 571 (2008).

Statement that witness not qualified to answer question. — In a condemnation action, the trial court did not improperly comment on the evidence by stating that a witness was not qualified to answer a legal question. Pertinent remarks made by a trial court in discussing the admissibility of evidence or explaining the court's rulings did not constitute prohibited expressions of opinion. Bulgin v. Ga. DOT, 292 Ga. App. 1, 663 S.E.2d 730 (2008).

Telling counsel not to make statements not violation of statute. — In telling defense counsel that counsel could not make statements when cross-examining a state's witness, the trial court did not violate O.C.G.A. § 9-10-7. The remarks did not pertain to guilt or innocence and were not an expression of opinion as to what had been

Application (Cont'd)

proven. Green v. State, 298 Ga. App. 17, 679 S.E.2d 348 (2009).

No expression of opinion made by trial judge. — In a customer's slip and fall case against a dry cleaner establishment, the trial court did not err by denying the customer's motion for a new trial and did not improperly express or intimate an opinion as to what had or had not been proved by making an inquiry concerning the relevancy of certain evidence nor by making two comments during the customer's closing argument that were limited in scope and did not concern the merits of the case and were aimed at preventing misstatements and improper arguments from being made before the jury. Further, the trial judge charged the jury after the close of evidence that anything the court had said or done during the course of the trial was not intended to imply or suggest which of the parties should prevail in the case. Muskett v. Sketchley Cleaners, Inc., 297 Ga. App. 561, 677 S.E.2d 731 (2009), cert. denied, No. S09C1422, 2009 Ga. LEXIS 412 (Ga. 2009).

In a medical malpractice case arising out of gastric bypass surgery, a trial judge's comments regarding a medical study involving blood thinners while the judge ruled on whether the defending doctor could look at the study to refresh the doctor's memory did not violate O.C.G.A. § 9-10-7 because they did not imply approval of any witness's testimony. Sellers v. Burrowes, 302 Ga. App. 667, 691 S.E.2d 607 (2010).

RESEARCH REFERENCES

ALR. — Pendency of criminal prosecution as ground for continuance or postponement of civil action involving facts or transactions upon which prosecution is predicated — state cases, 37 ALR6th 511.

9-10-8. Approval or disapproval of verdict by judge forbidden; discharge or commendation of jury for verdict not permitted; judge expressing approval or disapproval disqualified from presiding at new trial.

RESEARCH REFERENCES

ALR. — Disqualification or recusal of judge due to comments at Continuing Legal Education (CLE) seminar or other educational meetings, 49 ALR6th 93.

9-10-9. Jurors' affidavits permitted to uphold but not impeach verdict.

Reserved. Repealed by Ga. L. 2011, p. 99, § 10/HB 24, effective January 1, 2013.

Editor's notes. — This Code section was based on Civil Code 1895, § 5338; Civil Code 1910, § 5933; Code 1933, § 110-109. For present provisions, see O.C.G.A. § 24-6-606.

Law reviews. — For article on the 2011 repeal of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

9-10-14. Promulgation of form for use by inmates in actions against government.

JUDICIAL DECISIONS

No application to federal lawsuits. — In a case in which a federal district court found that a state inmate's claims under 42 U.S.C. § 1983 and Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, were time-barred, the inmate was not entitled to an equitable tolling. The inmate's contention that prison officials refused to provide the inmate the appropriate form to file a state court action did not warrant equitable tolling because O.C.G.A. § 9-10-14 did not apply to federal lawsuits. Price v. Owens, 634 F. Supp. 2d 1349 (N.D. Ga. 2009).

Construction of terms. — Georgia General Assembly's use of that phrase "the Department of Corrections and local penal and correctional institutions for use by their inmates" in O.C.G.A. § 9-10-14(d) supports the conclusion that the phrase "state or local penal or correctional institution" used in subsection (b) refers only to those institutions located in Georgia. Gay v. Owens, 292 Ga. 480, 738 S.E.2d 614 (2013).

No application to inmate not incarcerated in Georgia. — Georgia Supreme Court dismissed an inmate's petition for a writ of mandamus because the inmate was not incarcerated in Georgia; thus, the filing requirements of O.C.G.A. § 9-10-14(b) were not applicable to the inmate, and the inmate should have filed the petition initially with a Georgia superior court. Gay v. Owens, 292 Ga. 480, 738 S.E.2d 614 (2013).

Use of required form mandatory. — An inmate's complaint for mandamus relief against a state prison warden and the commissioner of the department of corrections should not have been permitted to proceed as the inmate failed to use the form required by O.C.G.A. § 9-10-14(b); the language of the statute was unambiguous and did not provide for any exceptions. Donald v. Price, 283 Ga. 311, 658 S.E.2d 569 (2008).

Statute does not provide exceptions to form requirement. — Clerk of court acts contrary to the requirements of O.C.G.A. § 9-10-14(b) when the clerk accepts for filing a complaint or initial pleading against a Georgia agency or official that is not in accord with the statute's requirements; the statutory language is unambiguous and does not provide for any exceptions: the clerk of a Georgia court is not to docket a mandamus petition without the statutorily required form. Gay v. Owens, 292 Ga. 480, 738 S.E.2d 614 (2013).

ARTICLE 2

VENUE

Law reviews. — For note, "Getting Personal With Our Neighbors-A Survey of Southern States' Exercise of General Jurisdiction and A Proposal for Extending Georgia's Long-Arm Statute," see 25 Ga. St. U.L. Rev. 1177 (2009).

PART 1

GENERAL PROVISIONS

9-10-30. Proceedings in equity generally; injunctions to stay pending litigation; divorce cases.

JUDICIAL DECISIONS

Cited in Owens v. Hill, 295 Ga. 302, 758 S.E.2d 794 (2014).

9-10-31. Actions against certain codefendants residing in different counties; pleading requirements; application.

Law reviews. — For survey article on trial practice and procedure, see 59 Mercer L. Rev. 423 (2007). For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008).

JUDICIAL DECISIONS

Trial court erred in granting transfer motion. — In a wrongful death medical malpractice suit, the trial court erred in granting the plaintiff's motion to transfer venue of the case because the remaining defendant had waived the defendant's venue defenses and, therefore, the plaintiff had no standing to require the trial court to transfer the case to the county where the defendant resided when the suit was filed. Richardson v. Gilbert, 319 Ga. App. 72, 733 S.E.2d 783 (2012).

Cited in Ga. Cas. & Sur. Co. v. Valley Wood, Inc., 290 Ga. App. 177, 659 S.E.2d 410 (2008); HD Supply, Inc. v. Garger, 299 Ga. App. 751, 683 S.E.2d 671 (2009); Tomsic v. Marriott Int'l, Inc., 321 Ga. App. 374, 739 S.E.2d 521 (2013).

9-10-31.1. Forums outside this state; waiver of statute of limitations defense.

Law reviews. — For survey article on trial practice and procedure, see 59 Mercer L. Rev. 423 (2007). For article, "Ten Insights Into Georgia's Doctrine of Forum Non Conveniens," see 14 Ga. St. B.J. 26 (2008). For annual survey on trial practice and procedure, see 65 Mercer L. Rev. 277 (2013).

JUDICIAL DECISIONS

Constitutionality.

O.C.G.A. § 9-10-31.1(a) does not automatically divest a superior court of its jurisdiction; to the contrary, a transfer of venue under the statute occurs only after the trial court exercises initial jurisdiction over the case to determine whether, in the interest of justice and for the convenience of the parties and witnesses a claim or action would be more properly heard in a forum outside the state. Accordingly, § 9-10-31.1(a) remains constitutional under Ga. Const. 1983, Art. VI, Sec. IV, Para. I. Hawthorn Suites Golf Resorts, LLC v. Feneck, 282 Ga. 554, 651 S.E.2d 664 (2007).

Mandatory condition precedent to dismissal under doctrine of forum non conveniens.

Georgia's forum non conveniens statute does not distinguish between motions to dismiss and motions to transfer, but

rather states that in determining whether to grant a motion to dismiss an action or to transfer venue under the doctrine of forum non conveniens, the court shall give consideration to the seven factors. Therefore, trial courts must consider the factors in ruling on either kind of motion. Kennestone Hosp., Inc. v. Lamb, 288 Ga. App. 289, 653 S.E.2d 858 (2007).

Seven factors must be considered. — It is an abuse of discretion for a trial court not to address each of the seven factors listed in O.C.G.A. § 9-10-31.1(a), and in order to ensure that the trial court's decision-making process was guided by the statutory requirements, the trial court must make specific findings either in writing or orally on the record demonstrating that the court has considered all seven of the factors. The same rules apply to a court considering whether the court should decline jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act, O.C.G.A. Art. 3, Ch. 9, T. 19, as an inconvenient forum in accordance with O.C.G.A. § 19-9-67. Murillo v. Murillo, 300 Ga. App. 61, 684 S.E.2d 126 (2009).

Forum non conveniens finding proper. — In a suit by a Delaware company against a consultant with regard to property the consultant had managed in Louisiana, the trial court properly held that Louisiana was a more convenient forum than Georgia; the relative ease of access to sources of proof favored Louisiana, the witnesses could more easily be compelled to testify there, any premises to be viewed were in Louisiana, the company would not be inconvenienced by traveling to Louisiana while the consultant would be inconvenienced by traveling to Georgia, a Georgia court would have difficulty in administering the case, and Georgia's interest in the matter was insignificant. Hawthorn Suites Golf Resorts, LLC v. Feneck, 282 Ga. 554, 651 S.E.2d 664 (2007).

Fulton County Superior Court did not err in transferring patients' medical malpractice case to Cobb County because the court made written findings of fact reflecting an analysis of the procedural framework of the forum non conveniens statute, O.C.G.A. § 9-10-31.1(a), specifically considering and weighing each of the seven factors enumerated, and the court further expressly included additional specifics with regards to those of the seven factors the court deemed relevant in the court's consideration and determination that transfer was warranted; the Cobb County Superior Court had subject-matter jurisdiction over medical malpractice cases, and venue was also proper in that county, and because the patients made no showing of harm by the adjudication of their case in Cobb County Superior Court, the patients demonstrated no basis to disturb the judgment entered against the patients upon the Cobb County jury's verdict. Lamb v. Javed, 303 Ga. App. 278, 692 S.E.2d 861 (2010).

Specific findings required.

When a trial court denied a motion to transfer venue without making findings of fact considering the factors in O.C.G.A. § 9-10-31.1, remand was required. The statute did not require findings only with regard to motions to dismiss, and it did not require findings only when a motion was granted. Kennestone Hosp., Inc. v. Lamb, 288 Ga. App. 289, 653 S.E.2d 858 (2007).

In a declaratory judgment action filed by an insurer seeking an order that the insurer had no duty to provide a defense or coverage under the insurance policy with the insured, because the trial court failed to comply with all the factors under O.C.G.A. § 9-10-31.1(a), and the vanishing venue doctrine did not apply, the venue transfer order was vacated, and the case was remanded for further hearing. Ga. Cas. & Sur. Co. v. Valley Wood, Inc., 290 Ga. App. 177, 659 S.E.2d 410 (2008).

A trial court erred in denying Florida defendants' motion to dismiss a Georgia suit for forum non conveniens because the court failed to make specific findings, either in writing or orally, on the record, demonstrating that it had considered all of the factors in O.C.G.A. § 9-10-31.1(a) as required. GrayRobinson, P.A. v. Smith, 302 Ga. App. 375, 690 S.E.2d 656 (2010).

Although a trial court was authorized to dismiss the child custody portion of a husband's case on the basis of forum non conveniens under O.C.G.A. § 19-9-67(a), the court erred in dismissing the hus-

band's divorce case as well because he had a right to litigate his divorce in his county of residence. Although the trial court could arguably decline to exercise jurisdiction over the divorce case under O.C.G.A. § 9-10-31.1, the trial court did not invoke § 9-10-31.1 or consider the factors that the statute enumerated. Spies v. Carpenter, 296 Ga. 131, 765 S.E.2d 340 (2014).

Requiring a finding on each statutory factor. — With regard to a motion to dismiss under the doctrine of forum non conveniens, the Georgia Supreme Court supposes that some case might require a finding on each factor under O.C.G.A. § 9-10-31.1(a) to adequately explain the decision but cannot say that such findings always or even usually are required; however, to the extent that the Georgia Court of Appeals has held otherwise in Park Ave. Bank v. Steamboat City Dev. Co., 317 Ga. App. 289 (2012); GrayRobinson, P.A. v. Smith, 302 Ga. App. 375 (2010); Ga. Cas. & Sur. Co. v. Valley Wood, Inc., 290 Ga. App. 177 (2008); Kennestone Hosp. v. Lamb, 288 Ga. App. 289 (2007); Federal Ins. Co. v. Chicago Ins. Co., 281 Ga. App. 152 (2006); Hewett v. Raytheon Aircraft Co., 273 Ga. App. 242 (2005), the Georgia Supreme Court overrules those decisions. By the statute's express terms, the trial court is required to consider each of the statutory factors enumerated in O.C.G.A. § 9-10-31.1(a), but the statute does not expressly require specific findings of fact on each factor. Wang v. Liu, 292 Ga. 568, 740 S.E.2d 136 (2013).

Denial of motion to transfer not improper.

In a medical malpractice case, the trial court properly denied a hospital owner's motion to transfer the case from Fulton county to Spalding county, where the hospital was located, as the physician resided in Fulton county, the plaintiff's expert witnesses would be flying into an airport there, the attorneys were located there, and the record did not show a need for compulsory process or a need to view the premises or that litigation there would inconvenience the owner; furthermore, O.C.G.A. § 9-10-31.1(a) did not single out medical malpractice actions for different consideration or treatment as to venue. Blackmon v. Tenet Healthsystem Spalding, Inc., 288 Ga. App. 137, 653 S.E.2d 333 (2007), rev'd on other grounds, 284 Ga. 369, 667 S.E.2d 348 (2008).

In an auto negligence suit, a trial court did not abuse the court's discretion by denying the defendant's motion to dismiss for forum non conveniens under O.C.G.A. § 9-10-31.1(a) because the court held a hearing and evaluated the defendant's claim as to the non conveniens factors and denied the motion based on the location of the collision, the close proximity of the two venues at issue, the comparative inconveniences to the parties, the location of the witnesses, and the difficulties of compulsory process in either venue. Gowdy v. Schley, 317 Ga. App. 693, 732 S.E.2d 774 (2012).

Trial court was not shown to have erred by denying the defendant's motion to dismiss under the doctrine of forum non conveniens because the defendant's counsel approved the form of the order on the motion to dismiss; therefore, the defendant could not complain that the record had no explanation of the decision of the trial court so as to permit meaningful appellate review and because the record had no explanation of that decision, the defendant could not carry the burden to show that the trial court abused the court's discretion when the court denied the motion. Wang v. Liu, 292 Ga. 568, 740 S.E.2d 136 (2013).

Granting of motion to transfer improper. — Trial court erred in granting a debtor's motion to transfer a bank's action alleging breach of a loan agreement and promissory note because the trial court's focus solely on the note and the note's venue clause was in contradiction of O.C.G.A. § 13-2-2(4); the promissory note was a loan document subject to the document protocols that were attached to the loan agreement, and no showing was contained in the record that the forum selection clause in the document protocols was unenforceable. Park Ave. Bank v. Steamboat City Dev. Co., 317 Ga. App. 289, 728 S.E.2d 925 (2012).

Dismissal on forum non conveniens grounds proper. — An appellant's suit to collect under a contract was properly dismissed on the ground of forum non conveniens under O.C.G.A. § 9-10-31.1(a)

where: seven of the nine appellees were Puerto Rican corporations; the hotel project involved was in Puerto Rico; evidence and witnesses pertaining to the appellees' defense were primarily in Puerto Rico; any site visit would have to take place in Puerto Rico; over 60,000 documents relating to the project were being maintained there; other cases arising from the project were pending there; a Puerto Rican court had appointed a special master; and there was a question as to whether the appellees had sufficient minimum contacts with Georgia. John Hardy Group, Inc. v. Cayo Largo Hotel Assocs., 286 Ga. App. 588, 649 S.E.2d 826 (2007).

Alleged wife's suit for a declaration that she was the common law wife of a decedent was properly dismissed for forum non conveniens under O.C.G.A. § 9-10-31.1(a) because the issue was already pending in a Florida probate court, where the wife had filed for letters of administration, and involved mainly Florida residents and a Florida estate. Collier v. Wehmeier, 313 Ga. App. 421, 721 S.E.2d 919 (2011).

Appeal dismissed as moot. — Patients' appeal of a judgment entered against them in a medical malpractice action on the ground that it was error to grant a motion to transfer filed by a hospital and corporation pursuant to the forum non conveniens statute, O.C.G.A. § 9-10-31.1, was dismissed as moot because the patients admitted in their appellate brief that their case had already been adjudicated, and it was too late for the patients to obtain an adjudication of their case in the Fulton County Superior Court; therefore, any determination by the court of appeals regarding whether the Fulton County Superior Court was authorized under the forum non conveniens statute to transfer their case to Cobb County Superior Court for adjudication would be an abstract exercise unrelated to any existing facts or rights. Lamb v. Javed, No. A09A2234, 2010 Ga. App. LEXIS 44 (Jan. 19, 2010).

Waiver of claim. — Patients waived their claim that the Fulton Superior Court failed to make oral or written findings of fact reflecting an analysis of the seven factors enumerated in O.C.G.A. § 9-10-31.1(a) because they acquiesced to the transfer order; the patients chose not to challenge the propriety of the transfer ruling on the grounds they asserted on appeal, despite having options and the opportunity to do so, and there was no dispute that the Cobb County Superior Count had subject-matter jurisdiction over medical malpractice cases and that venue was also proper in that county. Lamb v. Javed, No. A09A2234, 2010 Ga. App. LEXIS 44 (Jan. 19, 2010).

In a payee's action alleging that the makers breached promissory notes, the trial court erred in granting the makers' motion to dismiss under the forum non conveniens statute, O.C.G.A. § 9-10-31.1, because the language of the forum selection clauses in the notes precluded the makers from seeking to dismiss the cases based on the doctrine of forum non conveniens and since the makers agreed in the makers' promissory notes to waive any claims contrary to the provisions of the forum selection clauses, the makers waived the ability to seek such a determination under the statute; O.C.G.A. § 9-10-31.1(a) provides for the forum non conveniens determination to occur on written motion of a party, and the statute does not prohibit contracting parties from waiving the parties' option of moving for transfer or dismissal under the statute. Int'l Greetings USA, Inc. v. Cammack, 306 Ga. App. 786, 703 S.E.2d 386 (2010).

9-10-33. Action against nonresident found in state.

JUDICIAL DECISIONS

Nonresident agent served while physically present in the state. — Court had personal jurisdiction over the company and the agent since when a nonresident was found within the State of Georgia, O.C.G.A. § 9-10-33 provided the courts with a basis for personal jurisdiction independent from the long-arm statute. Because the agent was served with process while physically present within

the state, the exercise of personal jurisdiction would comport with due process. Carrier v. Jordaan, No. CV208-068, 2008 U.S. Dist. LEXIS 114596 (S.D. Ga. Oct. 17, 2008).

9-10-34. Action against third-party defendant.

JUDICIAL DECISIONS

Venue proper. — Venue was appropriate in the trial court and the court's finding to the contrary was erroneous, but the error was harmless given that the trial court retained the case instead of transferring the case, the third-party defendant was not dismissed from the case, and the trial court correctly granted summary judgment to the third-party defendant on a separate basis. Bostick v. CMM Props., 327 Ga. App. 137, 755 S.E.2d 895 (2014).

Part 2

Change of Venue

9-10-53. Conduct of proceedings following transfer.

Law reviews. — For article, "Appellate Practice and Procedure," see 63 Mercer L. Rev. 67 (2011).

JUDICIAL DECISIONS

Construction with O.C.G.A. § 5-3-34. — Although O.C.G.A. § 9-10-53 addresses the general conduct of further proceedings following a case transfer, O.C.G.A. § 5-3-34(b) sets forth the more specific rule governing the issuance of a certificate of immediate review for interlocutory appeals; thus, the general provisions of O.C.G.A. § 9-10-53 cannot override the clear and specific provisions of O.C.G.A. § 5-6-34(b) mandating that the certificate of immediate review be issued by the trial judge who entered the order in question. Mauer v. Parker Fibernet, LLC, 306 Ga. App. 160, 701 S.E.2d 599 (2010).

ARTICLE 3

SERVICE

9-10-73. Acknowledgment of service or waiver of process.

JUDICIAL DECISIONS

Time to file answer.

Trial court did not err in granting a creditor's motion for default judgment on the ground that a debtor failed to answer the complaint within thirty days pursuant to O.C.G.A. § 9-11-12(a) because the trial court was authorized to conclude that the debtor's counsel executed an acknowledgment and waiver pursuant to O.C.G.A. § 9-10-73, that the debtor's answer was due within thirty days after the acknowledgment and waiver, and that because it failed to serve an answer within that thirty-day period, its answer was untimely; O.C.G.A. § 9-11-4 did not apply because the acknowledgment of service

the creditor drafted and submitted to the debtor did not make reference to § 9-11-4, and the creditor also did not inform the debtor by means of the text prescribed in § 9-11-4(1). Satnam Waheguru Corp. v. Buckhead Cmty. Bank, 304 Ga. App. 438, 696 S.E.2d 430 (2010).

Agreement to waiver of service yet still filed answer late. — Trial court did not err in denying the motion for an extension of time to answer the complaint because the defendants agreed to a waiver of service yet still filed the answer late, the motion for an extension was made after the time for filing an answer had expired, and a judicial extension of the statutory time for filing the answer, in essence, would have allowed a circumvention of the default status of the action. Mecca Constr., Inc. v. Maestro Invs., LLC, 320 Ga. App. 34, 739 S.E.2d 51 (2013).

ARTICLE 4

PERSONAL JURISDICTION OVER NONRESIDENTS

9-10-90. "Nonresident" defined.

Law reviews. — For note, "Getting Personal With Our Neighbors — A Survey of Southern States' Exercise of General Jurisdiction and A Proposal for Extending Georgia's Long-Arm Statute," see 25 Ga. St. U.L. Rev. 1177 (2009).

JUDICIAL DECISIONS

Service of process under long-arm statute.

O.C.G.A. § 9-11-4(e)(1) did not govern service of process in a manufacturer's breach of contract action against a distributor because the distributor was not "authorized to transact business in the State" as that phrase was used in O.C.G.A. § 9-11-4(e)(1); the distributor did not show that the distributor was a corporation incorporated or domesticated under the laws of Georgia, because the distributor pointed to no evidence that the distributor obtained the requisite certificate of authority to transact business in the state from the Georgia Secretary of State pursuant to O.C.G.A. § 14-2-1501(a) and because the distributor was a nonresident subject to the long-arm statute, O.C.G.A. § 9-10-90 et seq. Kitchen Int'l, Inc. v. Evans Cabinet Corp., 310 Ga. App. 648, 714 S.E.2d 139 (2011).

Trial court was authorized to obtain personal jurisdiction over a child's parent under Georgia's long arm statute, O.C.G.A. §§ 9-10-90 and 9-10-91(6), because the child's grandparents petitioned for visitation rights after the parent became a nonresident by moving to Arizona to attend college and reside there upon graduation. Oglesby v. Deal, 311 Ga. App. 622, 716 S.E.2d 749 (2011).

Guarantying note sufficient to confer jurisdiction. — Trial court did not err in denying the guarantors' motion to dismiss for lack of personal jurisdiction a bank's action to recover on promissory notes securing loans to a limited liability company (LLC) and on guaranties of those loans because the guarantors transacted business in Georgia within the meaning of the Long Arm Statute, O.C.G.A. § 9-10-91(1), and given the guarantors' purposeful personal dealings with the bank, dealings which bestowed substantial benefits to the guarantors and induced substantial action by the bank to the bank's detriment, neither reasonableness nor fair play nor substantial justice would be offended by haling the guarantors into a Georgia court and exercising jurisdiction over the guarantors; the guarantors understood that the LLC was formed for the sole purpose of developing property in Georgia, the bank's claims arose out of the guarantors' Georgia activities, the guarantors pointed to no evidence showing that litigating the action in Georgia would unduly burden the guarantors, and Georgia had an interest in adju-

dicating the dispute because the dispute involved both a significant loss suffered by a Georgia financial institution and real property located in the state. Paxton v. Citizens Bank & Trust of W. Ga., 307 Ga. App. 112, 704 S.E.2d 215 (2010).

Defendants not residents when suit filed. — Trial court did not err in denying a motion filed by a corporate president and the president's spouse to dismiss a corporation's action against them or, in the alternative, to transfer the case because the trial court's application of the relation-back statute, O.C.G.A. § 9-11-15(c), did not violate the constitutional right of the president and the spouse to be sued in the county where they resided under Ga. Const. 1983, Art. VI, Sec. II, Para. VI; because the president and the wife were not residents of Georgia when the suit was filed, the proper venue had to be determined pursuant to Georgia's Long Arm Statute, O.C.G.A. §§ 9-10-91 and 9-10-93. Cartwright v. Fuji Photo Film U.S.A., Inc., 312 Ga. App. 890, 720 S.E.2d 200 (2011), cert. denied, No. S12C0600, 2012 Ga. LEXIS 306 (Ga. 2012).

9-10-91. Grounds for exercise of personal jurisdiction over nonresident.

A court of this state may exercise personal jurisdiction over any nonresident or his or her executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if he or she were a resident of this state, if in person or through an agent, he or she:

(1) Transacts any business within this state;

(2) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act;

(3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(4) Owns, uses, or possesses any real property situated within this state;

(5) With respect to proceedings for divorce, separate maintenance, annulment, or other domestic relations action or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph shall not change the residency requirement for filing an action for divorce; or

(6) Has been subject to the exercise of jurisdiction of a court of this state which has resulted in an order of alimony, child custody, child support, equitable apportionment of debt, or equitable division of

property if the action involves modification of such order and the moving party resides in this state or if the action involves enforcement of such order notwithstanding the domicile of the moving party. (Ga. L. 1966, p. 343, § 1; Ga. L. 1970, p. 443, § 1; Ga. L. 1983, p. 1304, § 1; Ga. L. 2010, p. 822, § 1/SB 491; Ga. L. 2011, p. 562, § 3/SB 139.)

The 2010 amendment, effective July 1, 2010, in the introductory paragraph, inserted "or her", inserted "or she" twice, and substituted "this state" for "the state"; in paragraph (5), substituted "divorce, separate maintenance, annulment, or other domestic relations action" for "alimony, child support, or division of property in connection with an action for divorce" near the beginning and inserted ", notwithstanding the subsequent departure of one of the original parties from this state and as to all obligations arising from alimony, child support, apportionment of debt, or real or personal property orders or agreements, if one party to the marital relationship continues to reside in this state" to the end of the first sentence; and added paragraph (6).

The 2011 amendment, effective July 1, 2011, deleted "or" from the end of paragraph (4); in paragraph (5), in the first sentence, deleted a comma following "action or" and deleted ", notwithstanding the subsequent departure of one of the original parties from this state and as to all obligations arising from alimony, child support, apportionment of debt, or real or personal property orders or agreements, if one party to the marital relationship continues to reside in this state" from the end, and in the last sentence, substituted "; or" for a period; and, in paragraph (6), deleted ", notwithstanding the subsequent departure of one of the original parties from this state," following "equitable division of property" in the middle and deleted a comma following "this state" near the end.

Cross references. — Exemption of witnesses from arrest and service of process, § 24-13-96.

Law reviews. — For article, "Recent Decision: Mitsubishi Motors Corp. v. Colemon: Broad Reading of Innovative Clinical Leads to General Personal Jurisdiction Under Georgia's Long-Arm Statute," see 43 Ga. L. Rev. 1321 (2009). For article, "Aviation Law: A Survey of Recent Trends and Developments," see 61 Mercer L. Rev. 585 (2010). For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010). For annual survey on trial practice and procedure, see 64 Mercer L. Rev. 305 (2012). For annual survey on business corporations, see 64 Mercer L. Rev. 61 (2012).

For note, "Getting Personal With Our Neighbors — A Survey of Southern States' Exercise of General Jurisdiction and A Proposal for Extending Georgia's Long-Arm Statute," see 25 Ga. St. U.L. Rev. 1177 (2009).

JUDICIAL DECISIONS

Analysis

General Consideration

Stalker who sent emails into Georgia from South Carolina not subject to jurisdiction. — Trial court erred in denying a South Carolina resident's motion to set aside a stalking permanent protective order issued against the resident. The Georgia court did not have personal jurisdiction over the nonresident under O.C.G.A. § 9-10-91 for stalking because the resident did not, in sending harassing emails from South Carolina, engage in conduct in Georgia. Huggins v. Boyd, 304 Ga. App. 563, 697 S.E.2d 253 (2010).

Jurisdiction of resident who becomes nonresident after tortious conduct.

The tolling statute could not be applied to extend the statute of limitations in consolidated personal injury renewal actions because the Long Arm Statute, O.C.G.A. §§ 9-10-91 and 9-10-94, could be utilized to serve the driver against whom the actions had been filed as the driver was a resident of Georgia at the time the driver was involved in an auto accident with a parent and child. Dickson v. Amick, 291 Ga. App. 557, 662 S.E.2d 333 (2008).

Resident's third automobile personal injury lawsuit against a former resident was properly dismissed because service of the resident's second lawsuit was not perfected in accordance with the Georgia Long-Arm Statute, O.C.G.A. § 9-10-91, and the period of limitations in O.C.G.A. § 9-3-33 ran before the third lawsuit (allegedly as a renewal of the second lawsuit under O.C.G.A. § 9-2-61) was filed. Coles v. Reese, 316 Ga. App. 545, 730 S.E.2d 33 (2012).

"Fiduciary shield" doctrine. — Nothing in O.C.G.A. § 9-10-91(1) suggests that the legislature intended to accord any special treatment to fiduciaries acting on behalf of a corporation or to insulate the fiduciaries from long-arm jurisdiction for acts performed in a corporate capacity, and such special treatment is one of those requirements which has occasionally been engrafted onto O.C.G.A. § 9-10-91(1) and which conflicts with the statute's literal language; thus, to the extent that the decisions apply the "fiduciary shield" doctrine or its equivalent, the Georgia Court of Appeals cases of Southern Electronics Distributors v. Anderson, 232 Ga. App. 648 (1998), and Girard v. Weiss, 160 Ga. App. 295 (1981), are hereby overruled, and the federal cases of Club Car v. Club Car (Quebec) Import, 362 F. 3d 775 (11th Cir. 2004), Canty v. Fry's Electronics, 736 F. Supp. 2d 1352 (N.D. Ga. 2010), and United States for Use and Benefit of WFI Ga. v. Gray Ins. Co., 701 F. Supp. 2d 1320, (N.D. Ga. 2010), will not be followed. Amerireach.com, LLC v. Walker, 290 Ga. 261, 719 S.E.2d 489 (2011).

Both the long-arm statute, O.C.G.A. § 9-10-91, and constitutional fairness concerns adequately protect corporate employees and officers, and the fiduciary shield doctrine unfairly prejudices plaintiffs who have valid claims against those individuals who have acted in a corporate capacity in Georgia; as with other corporate officers, those courts which follow the "fiduciary shield" rule either apply the rule to members of a limited liability company (LLC) or make an exception to avoid injustice, and accordingly, for the same reasons that the "fiduciary shield" doctrine is rejected with respect to other corporate officers, the rule is also rejected to members of an LLC but to be subject to the forum court's jurisdiction, a member's own activities must satisfy the minimum contacts test. Amerireach.com, LLC v. Walker, 290 Ga. 261, 719 S.E.2d 489 (2011).

Cited in Daniels v. Barnes, 289 Ga. App. 897, 658 S.E.2d 472 (2008); Gowdy v. Schley, 317 Ga. App. 693, 732 S.E.2d 774 (2012); Artson, LLC v. Hudson, 322 Ga. App. 859, 747 S.E.2d 68 (2013).

Constitutional Aspects and "Minimum Contacts"

Relation of claims to contacts.

The relationship between a Spanish corporation that owned a resort in the Dominican Republic and its contacts with Georgia — which included an Internet web site — and the negligence of a taxi driver who allegedly injured the taxi's passengers, residents of Georgia who had been vacationing at the resort, was too tenuous to permit jurisdiction over the corporation in Georgia. Sol Melia v.

Brown, 301 Ga. App. 760, 688 S.E.2d 675 (2009).

Insufficient contacts.

Federal and state-law claims of a company with a principal place of business in Georgia against a Florida physician were based on the physician's alleged involvement in a series of medical articles and advertisements claiming that a particular medical device was 86 percent effective; however, the company did not satisfy the company's burden of establishing the district court's personal jurisdiction over the physician under Georgia's long-arm statute. The physician's only contacts with Georgia included a single visit to a doctor's office to conduct training on the medical device and one or two related phone calls; because neither the business trip nor the phone calls were related to or gave rise to the company's claims against the physician, the company did not establish that the physician's actual contacts with Georgia arose out of or related to the company's allegations against the physician. N. Am. Med. Corp. v. Axiom Worldwide, Inc., No. 1:06-CV-1678-JTC, 2009 U.S. Dist. LEXIS 32280 (N.D. Ga. Apr. 9, 2009).

Although South Carolina defendants met the requirements of Georgia's long-arm statute, O.C.G.A. § 9-10-91, the defendants did not deliberately engage in significant activities in Georgia and did not have fair warning that the defendants might be haled into court in Georgia simply by hiring Georgia lawyers to handle litigation that occurred in Massachusetts. Therefore, the defendants were not subject to suit in Georgia by a company that provided expert witness and consulting services to the defendant in the Massachusetts litigation. Schmidt v. JPS Indus., No. 1:09-CV-3584-JEC, 2011 U.S. Dist. LEXIS 35284 (N.D. Ga. Mar. 31, 2011).

No minimum contacts found.

In the context of truck driver's Bivens action against the former director of the credentialing program office for the Transportation Security Administration, claiming that the revocation of the driver's hazardous material endorsement violated the driver's Fifth Amendment rights, the court lacked personal jurisdiction over the director because Georgia's long-arm statute and the requirements of due process were not satisfied; three or four one-day trips, occurring over the span of six years did not demonstrate continuous and systematic general business contacts between the director and the driver's cause of action simply did not arise out of, or relate to, the director's contacts with Georgia. Mahmud v. Oberman, 508 F. Supp. 2d 1294 (N.D. Ga. 2007), aff'd, 262 Fed. Appx. 935 (11th Cir. 2008).

Exercise of personal jurisdiction held reasonable. — Because a seller sued an Illinois limited liability company (LLC) on an open account, long-arm jurisdiction over the LLC under the "transacting business" section of O.C.G.A. § 9-10-91(1) was reasonable and comported with due process. The LLC initiated the relationship with the seller and handled payment, the goods were delivered in Georgia to a Georgia apartment complex controlled by a related Georgia entity, and there was a long course of dealing between the parties. Home Depot Supply, Inc. v. Hunter Mgmt., LLC, 289 Ga. App. 286, 656 S.E.2d 898 (2008).

Grounds for Jurisdiction over Nonresidents

1. Transacting Business

Cause of action arising from business transaction satisfies minimum contact requirement.

Without the actions of a corporation, a salesman acting as the corporation's agent would not have been in a position to receive a limited liability company's (LLC's) checks or to fail to deliver title to a truck to the LLC. As these actions occurred in Georgia, the corporation was not forced to litigate there solely as a result of "random, fortuitous, or attenuated" contacts; it did business in Georgia sufficient to authorize the exercise of personal jurisdiction over the corporation under O.C.G.A. § 9-10-91(1). ATCO Sign & Lighting Co., LLC v. Stamm Mfg., 298 Ga. App. 528, 680 S.E.2d 571 (2009).

Court could exercise personal jurisdiction over a Canadian citizen pursuant to O.C.G.A. § 9-10-91 based on allegations that the nonresident—as a company's founder, leader, and majority sharehold-

Grounds for Jurisdiction over Nonresidents (Cont'd)
1. Transacting Business (Cont'd)

er—purposefully sought to acquire a Georgia business, drain the business's value for that citizen and the citizen's various entities, and leave the company bereft for the company's creditors. Kipperman v. Onex Corp., 411 B.R. 805 (N.D. Ga. 2009).

In a suit brought by an insurer seeking legal and equitable recission of an aviation insurance policy, the trial court properly denied the out-of-state insureds' motion to dismiss premised on lack of personal jurisdiction because the evidence showed that the insureds, through their agent, transacted business in Georgia and they were not being forced to litigate in Georgia because of random, fortuitous, or attenuated circumstances. Lima Delta Co. v. Global Aero., Inc., 325 Ga. App. 76, 752 S.E.2d 135 (2013).

Prerequisites for jurisdiction on basis of transacting business.

In a manufacturer's breach of contract action alleging nonpayment by a nonresident corporation for two shipments received at the manufacturer's Georgia facility, personal jurisdiction over the nonresident corporation was appropriate under O.C.G.A. § 9-10-91(1) because the nonresident corporation transacted business in Georgia by sending purchase orders to the manufacturer in Georgia, requesting delivery by customer pickup at the manufacturer's plant in Georgia, directing third parties to accept delivery of the goods in Georgia, taking legal title to the goods in Georgia, and promising to pay money in Georgia on the two shipments in question. Diamond Crystal Brands, Inc. v. Food Movers Int'l, 593 F.3d 1249 (11th Cir.), cert. denied, 131 S. Ct. 158, 178 L. Ed. 2d 39 (2010).

Emails and other actions sufficient to constitute transaction of business. — Trial court erred in dismissing a customer's action against an organization on the ground that the customer failed to join a corporation as a party because the order did not show that the trial court considered the factors listed in O.C.G.A. § 9-11-19(b), and the corporation was doing business in the state sufficient to confer jurisdiction under O.C.G.A. § 9-10-91(1); the corporation participated in a safari auction, which was advertised to the customer in Georgia, and numerous email messages were exchanged between the corporation in Africa and the customer in Georgia. Wright v. Safari Club Int'l, 307 Ga. App. 136, 706 S.E.2d 84 (2010).

Status of president of company alone will not establish jurisdiction. — Company president did not fall within the reach of the state long-arm statute because the employee failed to show that the president personally transacted any business in the state and the mere fact that the individual was the president of a company that did business in the state was insufficient to establish jurisdiction. Canty v. Fry's Elecs., Inc., No. 1:09-vc-3508-WSD-LTW, 2010 U.S. Dist. LEXIS 90624 (N.D. Ga. Aug. 31, 2010).

Proper venue had to be determined pursuant to Georgia's Long Arm Statute. — Trial court did not err in denying a motion filed by a corporate president and the president's spouse to dismiss a corporation's action against them or, in the alternative, to transfer the case because the trial court's application of the relation-back statute, O.C.G.A. § 9-11-15(c), did not violate the constitutional right of the president and the spouse to be sued in the county where they resided under Ga. Const. 1983, Art. VI, Sec. II, Para. VI; because the president and the wife were not residents of Georgia when the suit was filed, the proper venue had to be determined pursuant to Georgia's Long Arm Statute, O.C.G.A. §§ 9-10-91 and 9-10-93. Cartwright v. Fuji Photo Film U.S.A., Inc., 312 Ga. App. 890, 720 S.E.2d 200 (2011), cert. denied, No. S12C0600, 2012 Ga. LEXIS 306 (Ga. 2012).

This section requires that the defendant's liability arise out of the business transacted.

Personal jurisdiction could be exercised, consistent with due process, over nonresidents who negotiated the terms of loan documents and other contracts with a Georgia resident in Georgia. Ralls Corp. v. Huerfano River Wind, LLC, 27 F. Supp. 3d 1303 (N.D. Ga. 2014).

This section permits personal jurisdiction over nonresident, etc.

A trial court properly found that personal jurisdiction existed against an automobile manufacturer, despite the fact that the manufacturer's principal place of business was located in California as the manufacturer: (1) had a registered agent in the State of Georgia; (2) transacted business in Georgia through the agent; and (3) made judicial admissions that the manufacturing was in the business of designing, testing, and manufacturing motor vehicles for use in Georgia as well as the United States. Moreover, the exercise of jurisdiction over the manufacturer was reasonable and did not violate notions of fair play and substantial justice. Mitsubishi Motors Corp. v. Colemon, 290 Ga. App. 86, 658 S.E.2d 843 (2008).

Guarantying a note sufficient to confer jurisdiction.

Trial court did not err in denying the guarantors' motion to dismiss for lack of personal jurisdiction a bank's action to recover on promissory notes securing loans to a limited liability company (LLC) and on guaranties of those loans because the guarantors transacted business in Georgia within the meaning of the Long Arm Statute, O.C.G.A. § 9-10-91(1), and given the guarantors' purposeful personal dealings with the bank, dealings which bestowed substantial benefits to the guarantors and induced substantial action by the bank to the bank's detriment, neither reasonableness nor fair play nor substantial justice would be offended by haling the guarantors into a Georgia court and exercising jurisdiction over the guarantors; the guarantors understood that the LLC was formed for the sole purpose of developing property in Georgia, the bank's claims arose out of the guarantors' Georgia activities, the guarantors pointed to no evidence showing that litigating the action in Georgia would unduly burden the guarantors, and Georgia had an interest in adjudicating the dispute because the dispute involved both a significant loss suffered by a Georgia financial institution and real property located in the state. Paxton v. Citizens Bank & Trust of W. Ga., 307 Ga. App. 112, 704 S.E.2d 215 (2010).

Use of agent to sign guarantee sufficient for jurisdiction. — Defendants transacted business in Georgia sufficient to satisfy the long-arm statute, O.C.G.A. § 9-10-91(1), because powers of attorney which the defendants executed were valid, and hence defendants' guarantees— signed by the defendants' agent— were valid. The guarantee agreements constituted sufficient minimum contacts with Georgia to satisfy due process without offending traditional notions of fair play and substantial justice. Bank of Ozarks v. Kingsland Hospitality, LLC, No. 4:11-cv-237, 2012 U.S. Dist. LEXIS 144666 (S.D. Ga. Oct. 5, 2012).

Execution of guaranty contract sufficient transaction of business.

Neither reasonableness, fair play, nor substantial justice would be offended by haling a guarantor into a Georgia court and exercising jurisdiction over the guarantor in a lessor's action to recover the amount of a judgment the lessor obtained against a lessee for rent owed under a lease because the lease was for the rental of retail space in a Georgia shopping mall, and the guarantor personally guaranteed the rent obligations under the lease; although not all of the guarantor's contacts with the state directly related to the guaranty, the contacts did concern the business that the loan had funded and showed a nexus between the guarantor, the forum, and the transaction as a whole. and even though the consent to jurisdiction provision in the lease did not individually and directly bind the guarantor, it was relevant to show that the guarantor could anticipate being sued in a Georgia court for claims arising out of the operation of the store. Noorani v. Sugarloaf Mills L.P., 308 Ga. App. 800, 708 S.E.2d 685 (2011).

Trips and email satisfied minimum contacts. — Counterclaim defendant's trips to Georgia to meet with defendant's president and to visit the offices of a business venture, with emails that counterclaim defendant sent to defendant's president regarding formation and initial operations of venture, were sufficient to satisfy the minimum contacts. requirement, O.C.G.A. § 9-10-91(1). Lowdon PTY Ltd. v. Westminster Ceramics, LLC, 534 F. Supp. 2d 1354 (N.D. Ga. Jan. 25, 2008).

Construction activities. — In defendant's motion to transfer from Maryland

Grounds for Jurisdiction over Nonresidents (Cont'd)

1. Transacting Business (Cont'd)

to Georgia, the transferee court had personal jurisdiction over the defendant, pursuant to O.C.G.A. § 9-10-91(1), because the matter involved the defendant's rental of a crane from the plaintiff for a construction project located in Georgia and, as such, the defendant transacted business in Georgia so as to satisfy the Georgia long-arm statute; the exercise of personal jurisdiction also comported with due process given the extent of defendant's presence in Georgia. Elliot AmQuip, LLC v. Bay Elec. Co., No. ELH-10-3598, 2011 U.S. Dist. LEXIS 59234 (DC June 2, 2011).

Defendant not subjected to jurisdiction.

Copyright infringement suit against a website was dismissed for lack of personal jurisdiction under O.C.G.A. § 9-10-91(1) because there were insufficient contacts with the state since the website did not own any property or have any employees in the state and the website generated very little revenue from the website's few Georgia users. Imageline, Inc. v. Fotolia LLC, 663 F. Supp. 2d 1367 (N.D. Ga. 2009).

Jurisdiction over corporate officers in action alleging violations of the Georgia Sale of Business Opportunities Act. — Trial court erred in dismissing a physician's complaint against a health and nutrition multi-level distribution company's officers alleging violations of the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., and the Georgia Sale of Business Opportunities Act (SBOA), O.C.G.A. § 10-1-410 et seq., on the ground that the court lacked personal jurisdiction because in response to requests for admissions, the company admitted that the company was a "multi-level distribution company" as defined in the SBOA, that the provisions of the SBOA, O.C.G.A. § 10-1-415(c)(4), applied to any agreement made in Georgia, that the officers were founding members of the company and were officers when the physician became a marketer; the officers also admitted that the physician's cancellation rights under Georgia law were generally known to the officers, and the complaint was sufficient to state a claim against the officers. Walker v. Amerireach.com, 306 Ga. App. 658, 703 S.E.2d 100 (2010), aff'd in part, 290 Ga. 261, 719 S.E.2d 489 (2011).

Court of appeals did not err in ruling that a trial court had personal jurisdiction over the officers of a limited liability company (LLC) in a physician's action alleging that the officers violated the Sale of Business Opportunities Act, O.C.G.A. § 10-1-415(d)(1), because the allegations of a physician's complaint were sufficient to withstand the attack on the trial court's jurisdiction over the officers on the ground that the officers acted in their corporate capacities; the "fiduciary shield" doctrine did not apply, and the allegations in the complaint supported a finding that the officers were "primary participants" in the LLC's transaction of business within the state, that the cause of action arose from or was connected with such act or transaction, and that the "minimum contacts" test was therefore met. Amerireach.com, LLC v. Walker, 290 Ga. 261, 719 S.E.2d 489 (2011).

Long-arm personal jurisdiction over out-of-state parent company not established. — Trial court erred by denying an out-of-state company's motion to dismiss based on lack of personal jurisdiction because the company met the company's burden of showing a lack of minimum contacts needed to support the exercise of personal jurisdiction, and that conclusion was consistent with other jurisdictional authority holding that ownership of a resident nursing home subsidiary by an out-of-state parent corporation without more is insufficient to obtain jurisdiction of the parent corporation. Drumm Corp. v. Wright, 326 Ga. App. 41, 755 S.E.2d 850 (2014).

Contract with state resident.

Trial court erred in granting a lender's motion to dismiss on the ground of lack of personal jurisdiction because the trial court had personal jurisdiction pursuant to O.C.G.A. § 9-10-91(1); the lender negotiated the transaction in Georgia, decided to require a guaranty from a Georgia resident, and sent loan documents to the

guarantor in Georgia for the purpose of availing itself of the guarantor's financial resources in Georgia to consummate the closing of the underlying transaction; the lender's conduct in negotiating with a Georgia broker and sending documents to a Georgia resident for execution in Georgia provided fair warning that the lender could be subject to suit in Georgia. Crossing Park Props., LLC v. JDI Fort Lauderdale, LLC, 316 Ga. App. 471, 729 S.E.2d 605 (2012).

Placing parts into stream of commerce for resale. — In five consolidated aviation wrongful death cases and one aviation property case, the trial court properly denied the motion to dismiss for lack of personal jurisdiction filed by an out-of-state damper part seller as the seller's activities in placing the seller's dampers into the stream of commerce by manufacturing, selling, and delivering the parts for resale were sufficient to satisfy the requirements of due process and to confer jurisdiction over the company. Vibratech, Inc. v. Frost, 291 Ga. App. 133, 661 S.E.2d 185 (2008).

"Transacting business" is not involved where sole local performance is delivery of items ordered to Georgia.

Under O.C.G.A. § 11-2-401(2), a nonresident corporation took legal title to goods when the manufacturer tendered those goods to a third-party customer at the manufacturer's Georgia facility and issued a bill of lading listing the nonresident corporation as the consignee. Taking physical possession of the goods was not necessary; the nonresident corporation took legal title to goods located in Georgia, and that was sufficient for purposes of "transacting business" under O.C.G.A. § 9-10-91(1). Diamond Crystal Brands, Inc. v. Food Movers Int'l, 593 F.3d 1249 (11th Cir.), cert. denied, 131 S. Ct. 158, 178 L. Ed. 2d 39 (2010).

Circumstances insufficient to constitute transaction of business.

Where plaintiffs' complaint did not allege that defendant property partnership transacted any business within Georgia, owned any property within Georgia, or committed any tortious conduct within Georgia, in arguing that the property partnership could be subject to personal jurisdiction for making loans secured by property in Georgia, plaintiffs ignored the second requirement of O.C.G.A. § 9-10-91(3); thus, plaintiffs had failed to satisfy the requirements of the Georgia long-arm statute for personal jurisdiction over the property partnership. BMC-Benchmark Mgmt. Co. v. Ceebraid-Signal Corp., 508 F. Supp. 2d 1287 (N.D. Ga. 2007).

Father's defamation action against a foreign corporation and associated individuals was properly dismissed because the father failed to demonstrate personal jurisdiction under Georgia's long-arm statute, O.C.G.A. § 9-10-91, and personal jurisdiction did not exist under Fed. R. Civ. P. 4(k)(2) since the claims arose under state, not federal, law; the district court could not exercise jurisdiction under § 9-10-91(1) because the father's cause of action for defamation did not arise out of, or was connected to, any business transaction in Georgia, and § 9-10-91(3) did not authorize jurisdiction because the father failed to show that the corporation and individuals actually conducted or solicited business in Georgia, much less on a regular basis, or that they derived substantial revenue from goods used or services rendered in Georgia. Henriquez v. El Pais Q'Hubocali.com, No. 12-11428, 2012 U.S. App. LEXIS 25107 (11th Cir. Dec. 6, 2012) (Unpublished).

Mere operation of website not transacting business. — Plaintiff failed to demonstrate that the defendants transacted business in Georgia sufficient to meet the requirements of Georgia's long-arm statute, O.C.G.A. § 9-10-91, because an injury suffered by the plaintiff in Georgia due to an intentional tort did not satisfy the Georgia long-arm statute's transaction of business requirement, and merely operating a website accessible in Georgia, and everywhere else, did not constitute the actual transaction of business—the doing of some act or consummation of some transaction—by the defendants in the state. Jordan Outdoor Enters., Ltd. v. That 70's Store, LLC, No. (CDL), 2011 U.S. Dist. LEXIS 109271

Grounds for Jurisdiction over Nonresidents (Cont'd)
1. Transacting Business (Cont'd)

(M.D. Ga. Sept. 26, 2011).

2. Tortious Acts Within State

Defendant did not commit a tort in Georgia, etc.

Under the Georgia long-arm statute, O.C.G.A. § 9-10-91, defendants' tortious act did not occur in Georgia because the defendants' alleged tortious conduct occurred in Arkansas, where the defendants created the websites displaying the products, and injury to the plaintiff in Georgia as a result of the defendants' conduct in Arkansas could not have been considered a tortious act or omission within Georgia for purposes of O.C.G.A. § 9-10-91(2). Jordan Outdoor Enters., Ltd. v. That 70's Store, LLC, No. (CDL), 2011 U.S. Dist. LEXIS 109271 (M.D. Ga. Sept. 26, 2011).

Out of state residents performed acts in Georgia. — In a dispute between siblings over corporate funds, the trial court's exercise of personal jurisdiction over the two sisters from Mississippi did not contravene traditional notions of fair play and substantial justice because the brothers' claims were related directly to the sisters' purposeful acts in Georgia and the sisters reasonably could have expected to be sued in Georgia. Stubblefield v. Stubblefield, 296 Ga. 481, 769 S.E.2d 78 (2015).

3. Tortious Acts Outside State

Intervention and transfer not required. — In decedent's family members' wrongful death action pursuant to Tenn. Code Ann. § 20-5-106(a), personal jurisdiction over defendant under O.C.G.A. § 9-10-91(3) and (4) comported with due process, but under Fed. R. Civ. P. 24, decedent's estate administrator was not entitled to intervene and transfer was warranted pursuant to 28 U.S.C. § 1404(a). Hidalgo v. Ohio Sec. Ins. Co., No. 4:10-CV-0183-HLM, 2011 U.S. Dist. LEXIS 46002 (N.D. Ga. Feb. 24, 2011).

Because defendants, a New Hampshire resident and a Pennsylvania corporation, used computers outside of Georgia to access plaintiff Georgia corporation's computer file, the defendants were not subject to personal jurisdiction under O.C.G.A. § 9-10-91(2). LabMD, Inc. v. Tiversa, Inc., No. 12-14504, 2013 U.S. App. LEXIS 2495 (11th Cir. Feb. 5, 2013) (Unpublished).

4. Real Property Within State

Ownership of property.

Buyer failed to make an affirmative showing that the return of service was false because the complaint and summons were served upon the buyer at the buyer's Oregon address, and that service was proper under the Long Arm Statute, O.C.G.A. § 9-10-91 et seq., which applied to the buyer as the owner of real property situated within Georgia; the sworn return of service found in the record, which showed that the buyer was served at the buyer's Oregon address, constituted a prima facie showing of personal service, and the buyer submitted no evidence refuting the sworn return of service. Haamid v. First Franklin Fin. Corp., 299 Ga. App. 828, 683 S.E.2d 891 (2009).

5. Proceedings as to Alimony, Child Support, etc.

Continuing jurisdiction. — Since the original decree was entered in Georgia and the ex-husband, who was seeking modification and enforcement, continued to reside in Georgia, under the plain terms of O.C.G.A. § 9-10-91(6), the ex-wife was amenable to the jurisdiction of Georgia courts and the Constitution did not forbid the exercise of such jurisdiction. Barker v. Barker, 294 Ga. 572, 757 S.E.2d 42 (2014).

Jurisdiction for modification of child custody matters, etc.

Trial court was authorized to obtain personal jurisdiction over a child's parent under Georgia's long arm statute, O.C.G.A. §§ 9-10-90 and 9-10-91(6), because the child's grandparents petitioned for visitation rights after the parent had moved to Arizona to attend college and reside there upon graduation. Oglesby v. Deal, 311 Ga. App. 622, 716 S.E.2d 749 (2011).

Insufficient contacts with state.

Wife's motion to dismiss issues related

to alimony, division of marital property, and attorney fees was wrongly denied as there were not sufficient minimum contacts under O.C.G.A. § 9-10-91(5). The wife had not lived in Georgia since 2003, she did not own any property in Georgia and had not transacted any business in Georgia since 2003, the last marital domicile was in Virginia, the circumstances giving rise to the dissolution of the marriage occurred in Virginia, and the wife's only connection with Georgia had been brief visits during which she had no contact with the husband. Ennis v. Ennis, 290 Ga. 890, 725 S.E.2d 311 (2012).

Out of state husband not properly served. — Trial court erred by denying the husband's motion for a new trial in a divorce and child support action because the husband was not properly served with the summons and complaint as there was an absence of any evidence that service was made upon a resident of the husband's dwelling or usual place of abode in California; therefore, the court had to conclude that service was improper. Guerrero v. Guerrero, 296 Ga. 432, 768 S.E.2d 451 (2015).

9-10-93. Venue.

JUDICIAL DECISIONS

Venue properly lies in county where business transacted.

In a dispute between siblings over corporate funds, venue was proper with respect to the sisters in Forsyth County, Georgia since a substantial amount of the sisters' activities which gave rise to the brothers' claims were transacted in Forsyth County. Stubblefield v. Stubblefield, 296 Ga. 481, 769 S.E.2d 78 (2015).

Venue proper. — Trial court's finding that the a corporate president and the president's spouse were subject to a corporation's suit in Fulton County pursuant to the Georgia Long Arm Statute was not error because the brokers sued the corporation in Fulton County, thereby submitting themselves to jurisdiction and venue on the corporation's counterclaim; thus, the brokers were "suable" on the corporation's claims in Fulton County, and under O.C.G.A. § 9-10-93, Fulton County was the proper venue as to the president and the spouse. Cartwright v. Fuji Photo Film U.S.A., Inc., 312 Ga. App. 890, 720 S.E.2d 200 (2011), cert. denied, No. S12C0600, 2012 Ga. LEXIS 306 (Ga. 2012).

Cited in Gowdy v. Schley, 317 Ga. App. 693, 732 S.E.2d 774 (2012).

9-10-94. Service.

JUDICIAL DECISIONS

Service on nonresidents must be in same manner as on residents.

Trial court erred by denying the husband's motion for a new trial in a divorce and child support action because the husband was not properly served with the summons and complaint as there was an absence of any evidence that service was made upon a resident of the husband's dwelling or usual place of abode in California; therefore, the court had to conclude that service was improper. Guerrero v. Guerrero, 296 Ga. 432, 768 S.E.2d 451 (2015).

Service on nonresident who was a resident at time action accrued. — The tolling statute could not be applied to extend the statute of limitations in consolidated personal injury renewal actions because the Long Arm Statute, O.C.G.A. §§ 9-10-91 and 9-10-94, could be utilized to serve the driver against whom the actions had been filed as the driver was a resident of Georgia at the time the driver was involved in an auto accident with a parent and child. Dickson v. Amick, 291 Ga. App. 557, 662 S.E.2d 333 (2008).

Service on nonresident valid.

Given service on an Alabama resident by a private process server who verified the resident's identity through a closed door at the resident's residence before leaving the papers at the door as instructed, a trial court did not err in finding that service was proper under O.C.G.A. § 9-10-94 and striking the resident's untimely answer. The timing of the filing of the return of service was not relevant under O.C.G.A. § 9-11-4(h). Newsome v. Johnson, 305 Ga. App. 579, 699 S.E.2d 874 (2010).

O.C.G.A. § 9-11-4(e)(1) did not govern service of process in a manufacturer's breach of contract action against a distributor because the distributor was not "authorized to transact business in the State" as that phrase was used in § 9-11-4(e)(1); the distributor did not show that the distributor was a corporation incorporated or domesticated under the laws of Georgia, because the distributor pointed to no evidence that the distributor obtained the requisite certificate of authority to transact business in the state from the Georgia Secretary of State pursuant to O.C.G.A. § 14-2-1501(a) and because the distributor was a nonresident subject to the long-arm statute, O.C.G.A. § 9-10-90 et seq. Kitchen Int'l, Inc. v. Evans Cabinet Corp., 310 Ga. App. 648, 714 S.E.2d 139 (2011).

Trial court did not err when the court concluded that, pursuant to O.C.G.A. § 9-11-12(h)(1), a contractor waived objection to the sufficiency of service by a North Carolina deputy sheriff because the contractor appeared in court and filed a responsive pleading and motion, and the contractor failed to raise the issue of service by a North Carolina deputy sheriff in the contractor's first pleading or motion. Merry v. Robinson, 313 Ga. App. 321, 721 S.E.2d 567 (2011).

Service on nonresident invalid.

In five consolidated aviation wrongful death cases and one aviation property case, the trial court properly denied the motion to dismiss filed by an out-of-state damper part seller on the ground of insufficient service of process as personal service upon the seller's registered agent was appropriate under both the seller's State of Delaware and under Georgia law. Vibratech, Inc. v. Frost, 291 Ga. App. 133, 661 S.E.2d 185 (2008).

Cited in Oglesby v. Deal, 311 Ga. App. 622, 716 S.E.2d 749 (2011).

ARTICLE 5

VERIFICATION

9-10-110. Petitions for extraordinary equitable relief to be verified or supported by proof.

JUDICIAL DECISIONS

Insufficiently verified petition supportable by other proofs.

Director of the Environmental Protection Division of the Georgia Department of Natural Resources sought an injunction against a permittee for allegedly violating its permit and the Georgia Water Quality Control Act, O.C.G.A. § 12-5-20 et seq. Although the sworn verification filed with the complaint pursuant to O.C.G.A. § 9-10-110 was not phrased in positive language, dismissal of the complaint was not required because the Director submitted "other satisfactory proofs" in support of the complaint. Agri-Cycle LLC v. Couch, 284 Ga. 90, 663 S.E.2d 175 (2008).

9-10-111. When verified answer required; by whom made for corporate defendant.

JUDICIAL DECISIONS

Verification not required.

In plaintiff insured's action against defendant insurer, removed due to diversity of jurisdiction, federal rules applied as to procedures and thus, Fed. R. Civ. P. 11(a) applied, not O.C.G.A. § 9-10-111 and the insurer's answer was not required to be verified. Kirkland v. Guardian Life Ins. Co. of Am., No. 08-15699, 2009 U.S. App. LEXIS 18633 (11th Cir. Aug. 19, 2009).

9-10-112. Verification of answer in action on open account.

JUDICIAL DECISIONS

O.C.G.A. § 9-10-112 is not "faulty" for conflicting with O.C.G.A. § 9-11-8(b). — Code Section 9-10-112, as the more specific statute, prevails over § 9-11-8(b). Baylis v. Daryani, 294 Ga. App. 729, 669 S.E.2d 674 (2008).

Essential elements of defendant's plea.

Business owner filed a verified complaint on an open account against the defendants. As the defendants' answer did not deny specifically, as required by O.C.G.A. § 9-10-112, that the defendants were indebted to the owner in any sum or allege any specific amounts that the defendants were indebted to the owner, the answer had to be stricken. Baylis v. Daryani, 294 Ga. App. 729, 669 S.E.2d 674 (2008).

ARTICLE 6

AMENDMENTS

9-10-132. Amendment of misnomers on motion.

Law reviews. — For annual survey on trial practice and procedure, see 61 Mercer L. Rev. 363 (2009).

JUDICIAL DECISIONS

Grant of motion to correct a misnomer in corporate name inappropriate. — In a negligence suit brought by a pedestrian against an originally named company in the complaint, the trial court abused the court's discretion by granting the pedestrian's motion to correct a misnomer thereby changing the name of the defendant in the action to a limited partnership as the limited partnership was never served with the complaint, delivery of the summons and complaint to the limited partnership's registered agent was insufficient for service as the originally named company was used in the pleadings and the registered agent did not represent that originally named company, and the name change was not a mere correction but more of a party substitution. Nat'l Office Partners, L.P. v. Stanley, 293 Ga. App. 332, 667 S.E.2d 122 (2008).

Correction of misnomer did not constitute substitution of parties under O.C.G.A. § 9-10-132 or amendment of complaint under O.C.G.A. § 9-11-15(a). — Consumer's lawsuit against a telecommunications company was improperly dismissed because the consumer had effected service, but had wrongly named the company, and correc-

tion of the misnomer did not constitute a substitution of the parties under O.C.G.A. § 9-10-132 or an amendment of the complaint under O.C.G.A. § 9-11-15(a); thus, the consumer should not have been required to effect service on the company a second time. Mathis v. BellSouth Telecomms., Inc., 301 Ga. App. 881, 690 S.E.2d 210 (2010).

Cited in Riding v. Ellis, 297 Ga. App. 740, 678 S.E.2d 178 (2009).

ARTICLE 7

CONTINUANCES

9-10-150. Grounds for continuance — Attendance of party or attorney in General Assembly.

A member of the General Assembly who is a party to or the attorney for a party to a case, or any member of the staff of the Lieutenant Governor, the Speaker of the House of Representatives, the President Pro Tempore of the Senate, the Speaker Pro Tempore of the House of Representatives, or the chairperson of the Judiciary Committee or Special Judiciary Committee of the Senate or of the Judiciary Committee or Judiciary, Non-civil Committee of the House of Representatives who is the lead counsel for a party to a case pending in any trial or appellate court or before any administrative agency of this state, shall be granted a continuance and stay of the case. The continuance and stay shall apply to all aspects of the case, including, but not limited to, the filing and serving of an answer to a complaint, the making of any discovery or motion, or of any response to any subpoena, discovery, or motion, and appearance at any hearing, trial, or argument. Unless a shorter length of time is requested by the member, the continuance and stay shall last the length of any regular or extraordinary session of the General Assembly and during the first three weeks following any recess or adjournment including an adjournment sine die of any regular or extraordinary session. A continuance and stay shall also be granted for such other times as the member of the General Assembly or staff member certifies to the court that his or her presence elsewhere is required by his or her duties with the General Assembly. Notwithstanding any other provision of law, rule of court, or administrative rule or regulation, the time for doing any act in the case which is delayed by the continuance provided by this Code section shall be automatically extended by the same length of time as the continuance or stay covered. (Ga. L. 1905, p. 93, § 1; Civil Code 1910, § 5711; Code 1933, § 81-1402; Ga. L. 1952, p. 26, § 1; Ga. L. 1973, p. 478, § 1; Ga. L. 1977, p. 760, § 1; Ga. L. 1991, p. 376, § 1; Ga. L. 1996, p. 112, § 1; Ga. L. 2002, p. 403, § 1; Ga. L. 2006, p. 494, § 1/HB 912; Ga. L. 2009, p. 303, § 18/HB 117.)

The 2009 amendment, effective April 30, 2009, substituted "the Senate or of the Judiciary Committee or Judiciary, Non-civil Committee of the" for "either the Senate or the" in the first sentence. For intent, see the Editor's note.

Editor's notes. — Ga. L. 2009, p. 303, § 20, not codified by the General Assembly, provides that: "This Act is intended to reflect the current internal organization of the Georgia Senate and House of Representatives and is not otherwise intended to change substantive law. In the event of a conflict with any other Act of the 2009 General Assembly, such other Act shall control over this Act."

JUDICIAL DECISIONS

Allowance of summary judgment hearing while attorney at session of General Assembly. — Trial court violated a legislative stay under O.C.G.A. § 9-10-150 by allowing a summary judgment hearing to continue while the borrower's attorney, a state representative, attended a session of the General Assembly, as it was undisputed that the representative was the borrower's attorney as the representative's name appeared on all relevant court documents. Hill v. First Atl. Bank, 323 Ga. App. 731, 747 S.E.2d 892 (2013).

9-10-152. Grounds for continuance — Attendance at meeting of Board of Human Services or Board of Behavioral Health and Developmental Disabilities.

Should any member of the Board of Human Services or the Board of Behavioral Health and Developmental Disabilities be engaged, at the time of any meeting of the board, as counsel or party in any case pending in the courts of this state and should the case be called for trial during the regular session of the board, the absence of the member to attend the session shall be good ground for a postponement or a continuance of the case until the session of the board has come to an end. (Ga. L. 1933, p. 7, § 1; Code 1933, § 81-1405; Ga. L. 2009, p. 453, § 2-3/HB 228; Ga. L. 2010, p. 286, § 9/SB 244.)

The 2009 amendment, effective July 1, 2009, substituted "Board of Human Services" for "Board of Human Resources" near the beginning of this Code section.

The 2010 amendment, effective July 1, 2010, inserted "or the Board of Behavioral Health and Developmental Disabilities" near the beginning.

9-10-154. Grounds for continuance — Party providentially prevented from attendance; statement of counsel.

JUDICIAL DECISIONS

Motion for continuance properly denied.

In a proceeding to legitimate a child, the trial court did not abuse the court's discretion by denying the petitioning parent's motion for a continuance as seven continuances had already been granted in the case, five of which were attributable to the petitioning parent, and the trial court had scheduled the trial to accommodate the petitioning parent's surgery schedule, which was to have occurred after the trial. Appling v. Tatum, 295 Ga. App. 78, 670 S.E.2d 795 (2008).

Trial court did not abuse its discretion by denying a client's motion for a continuance because the client was not absent due to the providential cause contemplated by O.C.G.A. § 9-10-154 but for failing to maintain communication about a pending case; the client failed to maintain contact with counsel after having been

personally served with notice that a law firm had terminated a stipulation to pursue alternative dispute resolution, and that demonstrated a lack of the due diligence required to obtain a continuance under O.C.G.A. § 9-10-166. McLellan v. Chilivis, 302 Ga. App. 562, 692 S.E.2d 26 (2010).

Superior court did not abuse the court's discretion in denying a stepson's amended motion for continuance because the stepson failed to present any evidence under oath that the stepson was prevented from attending the trial of the case; the attorney's assertions in the amended motion for continuance regarding the stepson's health were not evidence. Bocker v. Crisp, 313 Ga. App. 585, 722 S.E.2d 186 (2012).

9-10-160. Continuance for absence of witness; what application to show.

JUDICIAL DECISIONS

Continuance properly denied where no showing of expectation of producing testimony at next term.

Given that the children of the deceased could not represent to the trial court that the children could have their expert available to testify at the next term of court, the record showed that the children failed to meet the requirements of O.C.G.A. § 9-10-160 and the trial court did not abuse the court's discretion in denying the children's application for a continuance in a wrongful death action. Davis v. Osinuga, 330 Ga. App. 278, 767 S.E.2d 37 (2014).

9-10-166. Diligence to be shown by applicant for continuance.

JUDICIAL DECISIONS

Refusal to grant continuance not error where movant lacked due diligence.

Trial court did not abuse its discretion by denying a client's motion for a continuance because the client was not absent due to the providential cause contemplated by O.C.G.A. § 9-10-154 but for failing to maintain communication about a pending case; the client failed to maintain contact with counsel after having been personally served with notice that a law firm had terminated a stipulation to pursue alternative dispute resolution, and that demonstrated a lack of the due diligence required to obtain a continuance under O.C.G.A. § 9-10-166. McLellan v. Chilivis, 302 Ga. App. 562, 692 S.E.2d 26 (2010).

Motion to extend discovery properly denied. — Trial court did not abuse its discretion in denying a property owner's motion to extend discovery as to a partnership because the motion was filed more than a year before the partnership joined the case and referred only to a developer; the motion was never amended to add the partnership and never applied to the partnership. Zywiciel v. Historic Westside Vill. Partners, LLC, 313 Ga. App. 397, 721 S.E.2d 617 (2011).

9-10-167. Continuance in discretion of court; countershowing to motion for continuance.

JUDICIAL DECISIONS

Order granting or denying continuance not reversible absent clear abuse of discretion.

In a proceeding to legitimate a child, the trial court did not abuse the court's discretion by denying the petitioning parent's motion for a continuance as seven continuances had already been granted in the

case, five of which were attributable to the petitioning parent, and the trial court had scheduled the trial to accommodate the petitioning parent's surgery schedule, which was to have occurred after the trial. Appling v. Tatum, 295 Ga. App. 78, 670 S.E.2d 795 (2008).

Trial court did not abuse the court's discretion by denying a defendant's motion for a continuance because the court instructed the plaintiff to ensure that the plaintiff's experts were made available to the defendant for interviewing, and the defendant indicated that the defendant would be able to accomplish the interviews on the evening of the first day of trial. LN West Paces Ferry Assocs., LLC v. McDonald, 306 Ga. App. 641, 703 S.E.2d 85 (2010).

RESEARCH REFERENCES

ALR. — Continuance of case because of illness of expert witness, 18 ALR6th 509.

ARTICLE 8

ARGUMENT AND CONDUCT OF COUNSEL

9-10-185. Prejudicial statements by counsel; prevention by court; rebuke of counsel and instruction to jury; mistrial.

JUDICIAL DECISIONS

ANALYSIS
OBJECTIONS
APPLICATION

Objections

Trial court's obligation after objection made. — In a medical malpractice case, the appellate court erred by concluding that the plaintiff waived the plaintiff's objection to one instance of allegedly improper closing argument and had acquiesced in the trial court's response to the other, thereby foreclosing further review of those claims because once the trial court sustained plaintiff's objection, the trial court assumed an independent duty to take some remedial action, a curative instruction, or rebuke of counsel, for example, without any additional request from plaintiff's counsel. Stolte v. Fagan, 291 Ga. 477, 731 S.E.2d 653 (2012).

As an objection was sustained to defense counsel's improper comments about a dentist's reputation during closing arguments in a dental malpractice action, but the trial court failed to take some remedial action and the comments could have affected the jury's verdict, a new trial was warranted. Stolte v. Fagan, 322 Ga. App. 775, 746 S.E.2d 255 (2013).

Necessity for opposing counsel to object or invoke ruling or instruction by court.

O.C.G.A. § 9-10-185, imposing a duty on the trial court to interpose and prevent counsel from making statements of prejudicial matters not in evidence, did not apply in a case in which, although counsel objected to opposing counsel's improper argument regarding reaction times, counsel never obtained a ruling either sustaining or overruling counsel's objection. It is the duty of counsel to obtain a ruling on counsel's motions or objections. Young v. Griffin, 329 Ga. App. 413, 765 S.E.2d 625 (2014).

Timely objection necessary to justify curative instructions. — Objections to counsel's improper statements under O.C.G.A. § 9-10-185 are waived unless the objections are made contempo-

Objections (Cont'd)

raneously; thus, a trial court did not err by failing to provide a curative instruction with regard to statements from plaintiff's counsel because the defendant was required to make a timely objection to counsel's statements that the defendant believed were improper. Pulte Home Corp. v. Simerly, 322 Ga. App. 699, 746 S.E.2d 173 (2013).

Application

Comment on party's failure to call expert not cause for mistrial. — Two patrons sued a bar owner after the patrons were shot by another customer, alleging the owner negligently failed to provide adequate security inside the bar. Defense counsel's comment in closing argument that in a long career, counsel had never defended a security negligence case where the plaintiff did not have a security expert was within the bounds of permissible argument, and neither a mistrial nor a curative instruction was required. Vega v. La Movida, Inc., 294 Ga. App. 311, 670 S.E.2d 116 (2008).

9-10-186. Opening and closing arguments.

JUDICIAL DECISIONS

Denying right to final argument within trial court's discretion. — In a child custody modification case brought by a father, the trial court did not abuse the court's discretion in refusing the father's request for more argument after both his counsel and the mother's counsel had given their closing arguments; the father was not completely denied closing argument contrary to O.C.G.A. § 9-10-186. Gordon v. Abrahams, 330 Ga. App. 795, 769 S.E.2d 544 (2015).